UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

In re:	:	Case No. 10-BK-31607
GARLOCK SEALING TECHNOLOGIES, LLC, *et al.*,	:	Chapter 11
Debtors.[1]	:	Jointly Administered

POST-HEARING BRIEF OF THE OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS FOR ESTIMATION OF PENDING AND FUTURE MESOTHELIOMA CLAIMS

[FILED UNDER SEAL]

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[1] The Debtors are Garlock Sealing Technologies LLC, Garrison Litigation Management Group, Ltd., and The Anchor Packing Company. As used herein, "**Garlock**" refers to Garlock Sealing Technologies LLC and Garrison Litigation Management Group, Ltd.

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PRELIMINARY STATEMENT

Garlock spent a century making asbestos products that courts and juries around the country have determined killed people. For more than thirty years, Garlock has dealt with this toxic legacy, and its bankruptcy is an effort to resolve that issue for all time. Now, after a three-week hearing, the Court is well-positioned to rule on a key question in this final chapter: estimating Garlock's aggregate liability for pending and future mesothelioma claims as of the date of Garlock's bankruptcy petition. *See* Order for Estimation of Mesothelioma Claims, dated Apr. 13, 2012 [Dkt. No. 2102] (cited below as "**Est. Order**"). The Official Committee of Asbestos Personal Injury Claimants (the "**Committee**") respectfully submits this post-hearing brief to summarize the evidence and legal arguments.[2]

While there were many witnesses at the estimation hearing, the testimony and estimates of the opposing estimation experts are central: Dr. Mark A. Peterson testified for the Committee, Dr. Francine F. Rabinovitz for the legal representative of future claimants (the "**FCR**"), and Dr. Charles E. Bates for Garlock. Dr. Peterson employs an established methodology, one employed in every previous asbestos estimation ever decided by a court and widely used by corporations and their consultants (including Garlock and Dr. Bates prepetition), issuers of financial statements, trusts, and insurance companies. With an analysis firmly grounded in Garlock's claims resolution history, Dr. Peterson arrives at a preferred estimate of Garlock's present and

[2] The Committee's objections regarding certain evidentiary issues, Objections of Official Committee of Asbestos Personal Injury Claimants to (i) Exhibits and Deposition Designations Debtors Seek to Introduce in Evidence to Supplement the Record of the Estimation Hearing, and (ii) Debtors' "Offer Of Proof" as to Additional Matters not Presented at that Hearing, are attached as **Appendix I**. A summary of the testimony presented at the hearing is included in the Proposed Findings of Fact and Conclusions of Law Submitted by the Official Committee of Asbestos Personal Injury Claimants for the Estimation of Mesothelioma Claims, filed with this brief.

future asbestos liability of $1.265 billion. Using a close variation of this established method, Dr. Rabinovitz comes to a similar conclusion.

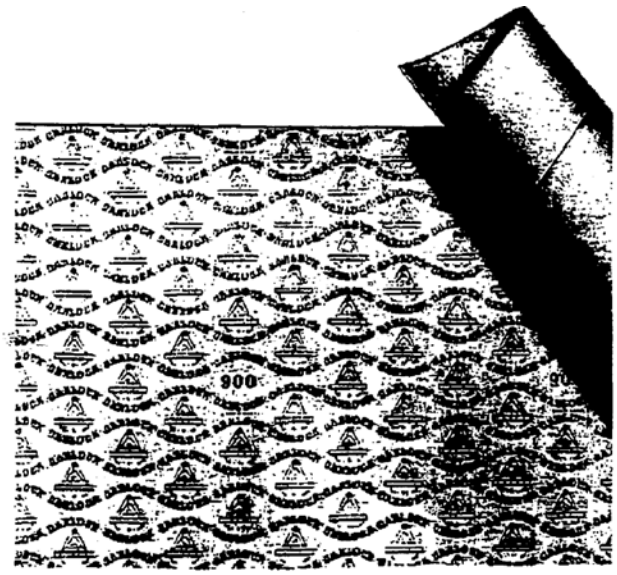
Garlock has a very different agenda, namely to use the bankruptcy to suppress Garlock's asbestos liability to salvage the equity of Coltec Industries, Inc. ("**Coltec**"), Garlock's stockholder. To that end, Garlock has instructed Dr. Bates to estimate what Garlock would owe for mesothelioma claims in an imaginary world of its own liking, rather than the tort system as it exists today. Using his novel methodology, Dr. Bates estimates Garlock's total present and future indemnity payments to mesothelioma victims to be less than $125 million, a fraction of Dr. Bates' own pre-petition estimates, Garlock's own internal and public estimates, and indeed less than what Garlock actually paid mesothelioma claimants in any ***two*** years between 2006 and 2010.

Garlock offers up a "wave" of justifications for this dramatically lower estimate, including novel estimation methodologies, scientific arguments, and suggestions of discovery abuses on the part of a small number of plaintiffs' law firms. Each of these justifications, as will be demonstrated here and in subsequent briefs, is meritless. The Court need not rewrite decades of tort litigation, decide scientific disputes or reanimate long-dead discovery disputes. Instead it should follow the course set in prior asbestos bankruptcies. The Committee's expert, Dr. Peterson, has followed that path. This Court should accordingly adopt Dr. Peterson's estimate of $1.265 billion.

FACTUAL BACKGROUND:
GARLOCK'S HUNDRED-YEAR HISTORY WITH ASBESTOS

Garlock's Use of Asbestos in Widely-Sold Products

From the early 1900s until 2001, Garlock sold asbestos-containing industrial sealing products and related materials, including gaskets, gasket materials, compression packing, expansion joints, and hydraulic components.[3] For example, Garlock sold rolls or sheets of asbestos gasket material to distributors or final customers who cut out gaskets. [4]



Garlock Sheet Gasket Material

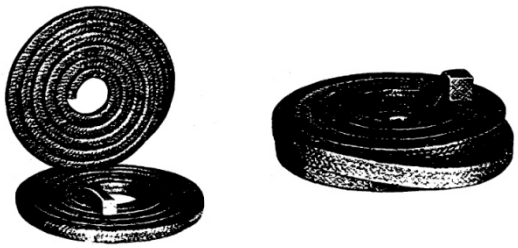
Garlock also sold pre-cut asbestos gaskets for various applications, such as gaskets for use in various models of boilers.[5]

[3] ACC-68 at GST-EST-0108977-78; ACC-69.

[4] A gasket is a static mechanical seal that joins two or more mating surfaces, such as flanges where pipes connect, or where a pipe connects to equipment such as a valve or pump.

[5] Heffron Dep. 198:15-199:22, Nov. 13, 2012.

In addition to gaskets and gasket material, Garlock sold asbestos packing in coils, spirals, and rolls.[6]



Garlock Asbestos Packing

Garlock also sold loose asbestos packing, a shredded asbestos material packaged in cans.[7]

Although gaskets and packing were the most prominent types of Garlock asbestos-containing products, Garlock sold others. For example, Garlock produced asbestos-containing tape, expansion joints and hydraulic components.[8] Garlock also sold asbestos cloth, which it supplied to other manufacturers for incorporation into those manufacturers' products.[9]

Many Garlock products consisted of as much as 85 percent asbestos, generally of the chrysotile variety, but some contained crocidolite asbestos.[10] In general, Garlock's products were prominently branded.[11] Gasket material was marked directly with a printed logo.[12] For products such as packing, which are more difficult to mark, the packaging was branded. In some

[6] Packing generally refers to material that forms a seal between a static component and a moving part, like a valve stem or drive shaft.

[7] Heffron Dep. 203:5-204:9, Nov. 13, 2012.

[8] *Id.* at 23:14-23, 70:4-19, 123:4-22.

[9] *Id.* at 120:2-11.

[10] ACC-69. Asbestos insulation products often contain lower percentages of asbestos. Hr'g Tr. 1469:1-1470:1, July 29, 2013 (Longo).

[11] ACC-68 at GST-EST-0108980.

[12] Heffron Dep. 192:5-193:6, Nov. 13, 2012.

cases, Garlock sold unbranded products, and purchasers rebranded those products before resale.[13] Garlock's gaskets and packing bore no warnings concerning the dangers of asbestos until 1977.[14]

Garlock's asbestos-containing gaskets and packing were sold widely to commercial, industrial and government entities that used those products to seal fluids and gases in pipes, valves, pumps, boilers, engines, and other mechanical devices.[15] Customers included the U.S. Navy, petrochemical facilities, shipyards, steel mills, chemical plants, breweries, mining operations, and waste and water treatment plants.[16] These customers used Garlock products in, among other settings, steam lines, boilers, compressors, refrigeration equipment, engine heads, and fluid conduits.[17]

As a result of the extensive distribution of Garlock products, individuals in a variety of occupations were exposed to Garlock asbestos-containing products, including but not limited to pipefitters, millwrights, shipwrights, boilermakers, and machinists.[18] Individuals were exposed to asbestos fibers from Garlock products in different ways. Fibers were released from Garlock products when the products were cut or manipulated during installation, or as they were removed during maintenance.[19]

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[13] ACC-68 at GST-EST-0108981.

[14] *Id.* at GST-EST-0108970.

[15] *See*, *e.g.*, ACC-254 (EnPro Indus., Inc. 2003 10-K) at 23-24; ACC-149 (EnPro Indus., Inc. 2007 10-K) at 7.

[16] Heffron Dep. at 49:23-50:2, 60:24-61:12, 138:18-140:16, 143:25-144:17, Nov. 13, 2012; ACC-75; ACC-80.

[17] ACC-68 at GST-EST-0108978; ACC-80.

[18] Grant Dep. 200:4-8, Nov. 1, 2011; Hr'g Tr. 1473:18-1474:3, July 29, 2013 (Longo).

[19] Hr'g Tr. 1474:13-1475:13, 1514:11-24, July 29, 2013 (Longo).

For example, the Committee's expert James Shoemaker described exposure to asbestos fibers released during the removal and installation of gaskets on Navy ships at Norfolk Naval Shipyard.[20] During maintenance of shipboard pipes and valves, gaskets had to be replaced. The exposure first occurred as old gaskets (depicted below) were removed from pipe flanges and valves. After the flange was separated, the old gasket had to be removed.

In many cases, the old gasket would be dried out and firmly stuck to the seating areas of the flange, such that removal required cleaning with a power-driven wire brush, as well as scraping with a variety of tools.[21]

[20] Hr'g Tr. 1652:15-1679:11, July 29, 2013 (Shoemaker).

[21] *Id.* at 1671:15-1673:13; Borgen Dep. 40:22-23, 41:3-12, June 1, 2000; Hyder Dep. 25:18-26:5, 26:6-7,10, 28:5-12; 28:15-21, Mar. 15, 2000 (Vol. 1); Isaacs Dep. 100:21-101:7, June 1, 2000; Maney Dep. 43:21-45:9, May 9, 2001.

The removal process produced considerable dust, particularly during wire-brushing.[22] Re-assembling the flange required the fabrication and installation of a new gasket. In most cases, the worker cut the new gasket from rolls of sheet gasket material. The worker cut the sheet and placed it against the flange to mark the bolt holes and flange openings. Bolt holes were cut out with punches and knives were used to cut out the flange openings.[23] This process of cutting and installing a new gasket also could also produce substantial amounts of asbestos-laden dust.[24]

Asbestos fibers can cause a variety of illnesses. These include non-cancerous lung diseases (called "non-malignant" diseases), and cancers such as mesothelioma. Non-malignant diseases include, for example, asbestosis, a pulmonary insufficiency caused by destruction of the air sacs in lung tissue.[25]

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[22] Hr'g Tr. 1647:17-25, July 29, 2013 (Shoemaker).

[23] *Id.* at 1669:13-1671:14.

[24] *Id.* at 1671:10-14; Hr'g Tr. 1472:22-1475:19, July 29, 2013 (Longo).

[25] *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 739-40 (E. & S.D.N.Y. 1991), *judgment vacated on other grounds by* 982 F.2d 721 (2d Cir. 1992).

This estimation proceeding, however, is focused on the claims of individuals suffering from mesothelioma. Mesothelioma is a rare form of cancer in which cancerous cells are found in the mesothelium, a protective sac that covers most of the body's internal organs.[26] The average latency period for mesothelioma—the period between exposure and diagnosis—is 35 years.[27] Once diagnosed, mesothelioma generally kills victims within two years.[28] Unlike many other cancers, for which there are multiple, well-documented causal factors, mesothelioma is uniquely associated with asbestos exposure.[29] Mesothelioma is caused by both chrysotile and amphibole forms of asbestos.[30]

Garlock's Changing Exposure to Asbestos Litigation

Asbestos litigation began in the mid-1970s. Litigation initially focused on large asbestos suppliers and insulation companies, most notably Johns Manville.[31] Other defendants were able to remain in a peripheral role while Manville took the lead defending cases.[32] Then, in 1982, less than a decade after the litigation began, Manville filed for bankruptcy.[33] With Manville in bankruptcy, plaintiffs began to focus their efforts elsewhere, developing the case against other

[26] Hr'g Tr. 1837:19-1838:4, July 30, 2013 (Brody).

[27] Hr'g Tr. 356:2-5, July 23, 2013 (Garabrant); Hr'g Tr. 469:15-18, July 23, 2013 (Sporn); Hr'g Tr. 1083:9-14, July 25, 2013 (Weill).

[28] *Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. at 740; Hr'g Tr. 1866:4-7, July 30, 2013 (Brody).

[29] Hr'g Tr. 1971:2-11, July 30, 2013 (Brodkin).

[30] Hr'g Tr. 2104:7-2105:19, July 31, 2013 (Welch).

[31] Hr'g Tr. 3420:11-3421:19, Aug. 6, 2013 (Hanly); Hr'g Tr. 3539:15-3540:4, Aug. 7, 2013 (Rice); Hr'g Tr. 3796:13-20, Aug. 8, 2013 (Patton).

[32] Hr'g Tr. 3431:25-3433:19, 3426:13-3427:22, Aug. 6, 2013 (Hanly).

[33] Hr'g Tr. 3426:13-16, Aug. 6, 2013 (Hanly).

defendants.[34] Additional asbestos bankruptcies then occurred throughout the 1980s and 1990s, including those of Raybestos Manhattan, Celotex, Eagle Picher, and Keene.[35] Judge Weinstein, the jurist who oversaw the Manville bankruptcy trust restructuring litigation, recognized the resulting cyclical nature of asbestos litigation as early as 1991, observing that, as certain defendants filed for bankruptcy, a "newer generation of peripheral defendants" became the focus of litigation.[36] The early 2000s saw this cycle continue, with bankruptcies such as Owens Corning, Pittsburgh Corning, U.S. Gypsum, and Babcock & Wilcox.[37]

Meanwhile, the nature of asbestos claims was slowly changing. In the 1990s, claims by individuals suffering from non-malignant asbestos diseases predominated. As the exposed population aged, however, the type of claimant changed. Many individuals who had been exposed to massive amounts of asbestos-containing material as insulators began to die off. The remaining claimant population displayed a different exposure profile.[38] Courts also began to adopt various measures to limit non-malignant claims, such as moving malignant cases ahead in the trial queue.[39] As a result, throughout the 2000s, asbestos litigation began to focus increasingly on mesothelioma claims.[40] Today, mesothelioma and other cancer claims predominate in asbestos litigation.[41]

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[34] Hr'g Tr. 3540:5-8, Aug. 7, 2013 (Rice).

[35] Hr'g Tr. 3426:2-12, Aug. 6, 2013 (Hanly).

[36] *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 747 (E. & S.D.N.Y. 1991), *judgment vacated on other grounds by* 982 F.2d 721 (2d Cir. 1992).

[37] Hr'g Tr. 3431:21-3435:9, Aug. 6, 2013 (Hanly); Hr'g Tr. 3546:3-8, Aug. 7, 2013 (Rice).

[38] Hr'g Tr. 3472:4-3473:24, Aug. 7, 2013 (McClain).

[39] Hr'g Tr. 3550:25-3551:15, Aug. 7, 2013 (Rice).

[40] Hr'g Tr. 3551:11-15, Aug. 7, 2013 (Rice).

[41] *Id.*

Garlock experienced every phase of this history. It was first named in an asbestos personal injury case in 1975.[42] When Manville filed for bankruptcy in 1982, Garlock joined other defendants in an unsuccessful motion to have asbestos litigation around the country stopped because Manville had been bearing the majority of defense costs and settlement outlays, to the advantage of less prominent defendants, but was no longer participating in the litigation by virtue of the automatic stay.[43] By the early 1990s, Garlock was being sued by more than 20,000 asbestos claimants annually.[44] Nevertheless, throughout the 1980s and well into the 1990s, Garlock was able to remain as a peripheral defendant.[45]

Garlock's experience changed in the late 1990s and early 2000s. Around this time plaintiffs began to strengthen the liability case against Garlock by, for example, using experts to explain how Garlock's products emitted asbestos fibers.[46] Dr. William Longo, who testified at the estimation hearing, was one such expert.[47] Garlock's prominence as an asbestos defendant began to increase. By the early 2000s, Garlock was receiving about 50,000 claims annually, including between 1,100 and 1,900 mesothelioma claims per year.[48] In addition, by the latter half of the 2000s, and consistent with the general trends noted above, mesothelioma claims predominated against Garlock.[49]

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[42] ACC-19 (EnPro Indus., Inc. 2005 10-K) at 30.

[43] Hr'g Tr. 3426:13-3427:22, Aug. 6, 2013 (Hanly); ACC-343.

[44] ACC-14 at GST-EST-120780.

[45] Hr'g Tr. 3876:8-21, Aug. 8, 2013 (Peterson).

[46] *Id.* at 3874:9-22; Mahoney Dep. 50:12-53:18, Feb. 26, 2013; Hr'g Tr. 3793:10-3796:3, Aug. 8, 2013 (Hanly).

[47] Mahoney Dep. 50:12-53:18, Feb. 26, 2013.

[48] ACC-14 at GST-EST-120780; Hr'g Tr. 3901:1-15, Aug. 8, 2013 (Peterson); ACC-824 at 37.

[49] Magee Dep. 69:5-71:10, Jan 23, 2013.

Mesothelioma claimants who sued Garlock asserted a range of causes of action under various state laws, such as strict products liability, failure to warn of the hazards of asbestos, and negligence.[50] They alleged that workers cutting and removing Garlock's asbestos containing gaskets and packing were exposed to dangerous quantities of airborne asbestos fibers from those products, as were other workers in the workplaces where such activities took place.[51] Claimants also maintained that Garlock had early knowledge that asbestos fiber emissions from its products could contribute substantially to causing mesothelioma.[52]

Garlock raised a variety of defenses to these claims. It maintained that it had no duty to warn; that the asbestos fibers in its products were "encapsulated" so that they did not emit dangerous quantities of fibers; that its asbestos-containing products contained mainly chrysotile, which Garlock alleged does not cause mesothelioma; and that plaintiffs' mesothelioma must be attributed to exposures to other asbestos products, such as insulation that Garlock did not manufacture or sell but that was present in the industrial settings where its products were used.[53] These defenses were deployed consistently throughout the 1990s and 2000s.[54] Sometimes the "other exposure" defense was deployed by co-defendants, and those co-defendants were able to allocate a portion of responsibility for a verdict to Garlock.[55]

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[50] Hr'g Tr. 57-69, Feb. 17, 2011 (Simon); Hr'g Tr. 3458:24-3459:24, Aug. 7, 2013 (McClain).

[51] Hr'g Tr. 57-69, Feb. 17, 2011 (Simon).

[52] *Id.*

[53] ACC-17 (2002 EnPro Indus., Inc. 10-K) at 16; ACC-18 (2004 EnPro Indus., Inc. 10-K) at 25; ACC-19 (2005 EnPro Indus., Inc. 10-K) at 31.

[54] Grant Dep. 128:11-129:25, 130:2-132:5, 132:7-133:5, 133:7-15, Nov. 1, 2011; Hr'g Tr. 3464:7-20, Aug. 7, 2013 (McClain).

[55] ACC-519, Exh B at 5.

Garlock's Approach to Managing Its Asbestos Liability

For more than thirty years facing asbestos personal injury claims in the tort system and until it filed for bankruptcy in 2010, Garlock resolved the overwhelming majority of claims consensually—by settlement or voluntary dismissal.[56] Although Garlock faced approximately 700,000 asbestos claims, Garlock tried only 245 cases to verdict, or less than 0.1 percent.[57] With respect to mesothelioma claims, Garlock faced more than 20,000 cases, but tried only 83 to verdict, less than one-half of one percent.[58] As Garlock disclosed in its parent's annual reports: "When a settlement demand is not reasonable given the totality of circumstances, Garlock will generally try the case."[59] That is, Garlock used trials strategically as a means to control settlement values.[60] Overwhelmingly, though, Garlock favored settlement over trial to resolve cases.

Before Garlock paid a settlement it required that the plaintiff provide both medical records confirming diagnosis of disease and evidence that he or she had been exposed to a Garlock product.[61] When settling a case, Garlock did not pay to resolve more than its own

[56] Grant Dep. 172:25-173:12, Nov. 1, 2011; Garlock 30(b)(6) Dep. (Magee) 23:24-24:2, Jan. 24, 2013; Hr'g Tr. 3208:7-11, Aug. 6, 2013 (Magee).

[57] Grant Dep. 172:25-173:12, Nov. 1, 2011; Hr'g Tr. 3889:2-7, Aug. 8, 2013 (Peterson).

[58] Hr'g Tr. 2918:22-2919:4, Aug. 5, 2013 (Bates).

[59] ACC-254 (EnPro Indus., Inc. 2003 10-K) at 79.

[60] Hr'g Tr. 3201:22-3205:9, Aug. 6, 2013 (Magee).

[61] Magee Dep. 300:5-19, Apr. 11, 2013; Hr'g Tr. 3195:7-20, Aug. 6, 2013 (Magee); Hr'g Tr. 2363:23-2364:15, Aug. 1, 2013 (Turlik).

several share of liability and that of affiliated companies.[62] Consequently, in settlement, Garlock obtained releases for all affiliated companies, but not for unrelated companies.[63]

Garlock's settlement-based strategy allowed Garlock to maintain a low profile in the litigation throughout most of the 1990s.[64] As part of this strategy, Garlock often settled claims in groups.[65] For example, Garlock settled 81 percent of mesothelioma claims in groups in the period 1996 to 2000.[66] Indeed, Garlock preferred group settlements.[67] As plaintiffs began to develop the liability case against Garlock in the 2000s, Garlock relied even more on group settlements.[68]

Although Garlock now wants to claim it settled simply to avoid defense costs, in fact settlement allowed Garlock to control its exposure to catastrophic verdicts, which were its principal concern. Garlock acknowledged this risk in securities filings, when it explained that the risk of adverse verdicts led it to use group settlements: "[T]he risk of large verdicts sometimes impacts the implementation of this strategy, and therefore it is likely that, from time to time, Garlock will enter into settlements that involve large numbers of cases, including early stage cases, when it believes that the risk outweighs the benefits of the strategy."[69]

Garlock's own internal assessments underscore its concerns about potentially devastating adverse verdicts. Garlock's internal procedures for approving settlements involved the creation

[62] Grant Dep. 38:22-39:23, Nov. 1, 2011; Ferrell Dep. 145:22-146:17, Jan. 11, 2013.

[63] Grant Dep. 40:2-15, Nov. 1, 2011; Hr'g Tr. 3195:21-3196:2, Aug. 6, 2013 (Magee).

[64] Hr'g Tr. 3873:2-18, Aug. 8, 2013 (Peterson).

[65] ACC-19 (EnPro Indus., Inc. 2005 10-K) at 37.

[66] Hr'g Tr. 3880:12-21, Aug. 8, 2013 (Peterson); ACC-824a at 17.

[67] Hr'g Tr. 3122:22-3123:1, Aug. 5, 2013 (Magee).

[68] Hr'g Tr. 3880:22-3881:6, Aug. 8, 2013 (Peterson); ACC-824a at 17.

[69] ACC-149 (EnPro Indus., Inc. 2007 10-K) at 33.

of a document called a "Major Expense Project Approval" form ("**MEA**") to memorialize the reasons for entering into the proposed settlement.[70] MEAs for settlements over certain thresholds were then signed by senior management. Shortly before the estimation hearing, the Court authorized discovery of MEAs for 26 cases featured in Garlock's arguments about supposed discovery abuses and defense costs; during the hearing, the Court extended that discovery to include the MEAs for additional cases referenced by Garlock in those arguments.[71] These MEAs are replete with candid assessments of Garlock's exposure to the possibility of substantial adverse verdicts. For example, in the internal assessment of one proposed settlement of a California mesothelioma case, Garlock's in-house counsel reported that a jury consultant found that the jury pool "was far worse than the jury panel that awarded Robert Treggett over $22 million, including a $15 million punitive damage award."[72] When contemplating settling a group of cases with a prominent California firm, Garlock's internal deliberations included the following analysis:

> Even if there were no economic damages in these cases, the collective potential verdict for them is over a billion dollars, as Oakland is one of the most pro-plaintiff jurisdictions in the country and the Kazan firm is one of the most effective[] asbestos plaintiffs' firms in the country. Additionally, the Kazan firm enjoys an excellent relationship with the pro-plaintiff judge. That judge is leaving the bench at the end of the year. For that reason, if we do not agree to settle these cases, which is clearly the prudent and advisable thing to do based upon the merits of these cases and their venue, alone, the judge will set all of these cases in a consolidated trial by year end. In turn, Garlock would most

[70] *See, e.g.*, ACC-754 at GST-EST-0556312.

[71] *See* Order Granting in Part and Denying in Part the Motion of the Official Committee of Asbestos Personal Injury Claimants and Joseph W. Grier, III, Future Asbestos Claimants' Representative, for an Order *in Limine* or, in the Alternative, to Compel Discovery dated June 18, 2013 [Dkt. No. 2960]; Hr'g Tr. 1417:16-23, July 26, 2013.

[72] ACC-341.

> probably be faced with a verdict exceeding a billion dollars, including a punitive damages finding.[73]

In another MEA for a group settlement of New York cases, Garlock's in-house counsel discussed an "extremely dangerous" mesothelioma case "which alone easily has a $10 to $15 million verdict potential.[74] The assessment recommends the group settlement as "favorable to Garlock, particularly when weighed against the dangers of trying cases in New York City."[75]

The MEAs recognize that group settlements extinguished the risk of liability cost-effectively. The MEA for a group settlement in Virginia recounts that "Garlock's share of the forecasted verdict in the Brown case, alone, would have greatly exceeded the cost of this deal. In the end, this deal prevents two or three probable adverse[] verdicts, and provides us a substantial savings on their further defense."[76] Clearly, Garlock understood and admitted internally that many mesothelioma cases presented catastrophic verdict risks. Settling in groups eliminated these risks cost-effectively.

There is, in fact, no real debate that Garlock's inside and outside counsel were always aware of the risk of adverse liability findings at trial, and weighed those risks carefully when settling cases. As Garlock's outside trial counsel in charge of the Western United States explained, he always took trial risk into account when settling cases.

> [Mr. Guy:] And we're focusing today on the mesothelioma case, but you've focused – you've settled hundreds of mesothelioma cases for Garlock.
>
> [Mr. Glaspy:] Thousands.

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[73] ACC-754 at GST-EST-0556300.

[74] *Id.* at GST-EST-0556290.

[75] *Id.*

[76] ACC-770.

[Mr. Guy:] Thousands. Did you consider trial risks when you settled those cases?

[Mr. Glaspy:] Always.[77]

Despite the threat of adverse verdicts, Garlock did from time to time try mesothelioma cases. While it won more than it lost, Garlock also suffered the very catastrophic verdicts it feared. The *Treggett* case in California was one such case, where Garlock suffered a verdict in excess of $22 million in 2005, including punitive damages.[78] Garlock typically appealed these losses, and sometimes settled them for an amount less than the jury verdict, but the appeal bonds required could affect Garlock's overall financial situation negatively, by tying up needed cash.[79]

Garlock's *modus operandi*, however, was to avoid these risks by entering into group settlement arrangements with individual plaintiff law firms. Group settlements took many forms. Some were formal written arrangements designed to last for several years setting out target average settlement amounts and annual caps on the amounts that would be paid to claimants of a given plaintiff law firm.[80] Others were less formal understandings by which Garlock would

[77] Hr'g Tr. 4662:19-25, Aug. 22, 2013 (Glaspy). *See also* Hr'g Tr. 3251:18-20, Aug. 6, 2013 (Magee) ("And there's no question, absolutely no question, that that made these dangerous cases with real risks at trial.") (discussing ACC-770); Hr'g Tr. 3237:3-4, Aug. 6, 2013 (Magee) ("There is certainly risk and expense, and it's prudent to resolve it. I'll agree with that conclusion."); Hr'g Tr. 3240:20-3241:5, Aug. 6, 2013 (Magee) (discussing ACC-767); Hr'g Tr. 3249:21-3250:6, Aug. 6, 2013 (Magee) (discussing ACC-770); Hr'g Tr. 3262:6-13, Aug. 6, 2013 (Magee) (discussing *Fowers* case); Hr'g Tr. 2376:7-8, Aug. 1, 2013 (Turlik) ("When we settle a case, it's for two reasons. It's to eliminate trial risk and trial costs. So, yes."); Hr'g Tr. 2532:13-18, Aug. 1, 2013 (Turlik); Mahoney Dep. 27:23-31:6, Feb. 26, 2013; Drake Dep. 58:11-59:11, Nov. 7, 2012; Henzel Dep. 32:15-19, Nov. 14, 2012; O'Reilly Dep. 169:7-19, Feb. 22, 2013; Grant Dep. 216:11-18, Nov. 1, 2011; Hr'g Tr. 88:6-9, Mar. 3, 2011 (Glaspy).

[78] ACC-244.

[79] Hr'g Tr. 3075:2-24, Aug. 5, 2013 (Magee); Hr'g Tr. 3262:14-22, Aug. 6, 2013 (Magee).

[80] *E.g.*, ACC-215; *see also* Ferrell Dep. 69:7-76:3, 76:6-77:15, Jan. 11, 2013.

negotiate groups of cases on a yearly basis, or as cases were periodically set for trial.[81] Throughout, Garlock applied a business-like approach, negotiating to resolve the greatest number of cases at the least possible cost.[82] As it might with other business arrangements, Garlock then applied pressure to "buy" these cases at ever cheaper prices.

Until the late 2000s, Garlock settled cases against the backdrop of its available insurance resources. Beginning in the 1980s, Garlock negotiated a series of "coverage in place" agreements with its insurers so that, by the late 1990s, Garlock was receiving periodic payments of funds from insurers to deal with asbestos litigation.[83] Garlock's overall strategy for managing asbestos liability focused on arranging settlements so that the timing of insurance receipts matched settlement payments as closely as possible, thereby reducing the effect of the asbestos liabilities on net income and shareholders' equity.[84] By the mid 2000s, however, Garlock recognized that insurance receipts would soon be fully committed and asbestos liability would begin to have a more visible impact on the company's financials.[85] One result is that, with some success, Garlock began to cite Garlock's tightening financial situation in negotiations with plaintiffs' firms for lower settlements.[86]

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[81] *E.g.*, ACC-658.

[82] Hr'g Tr. 3192:21-3195:3, 3208:12-21, Aug. 6, 2013 (Magee).

[83] Grant Dep. 208:18-209:20, Nov. 1, 2011; *see also* Hr'g Tr. 3207:12-3203:22, Aug. 6, 2013 (Magee). Some insurers retained the right to audit settlements. Garlock has passed all such audits that have been completed. Barry Dep. 137:2-139:2, 139:17-140:19, Nov. 6, 2012.

[84] Magee Dep. 36:13-25, 42:19-49:21, Jan. 23, 2013; Hr'g Tr. 3366:21-3367:4, Aug. 6, 2013 (Magee).

[85] Magee Dep. 131:7-132:9, Jan. 23, 2013; Hr'g Tr. 3368:2-12, Aug. 6, 2013 (Magee).

[86] Hr'g Tr. 3878:10-19, Aug. 8, 2013 (Peterson); Hr'g Tr. 4640:11-4641:1, Aug. 22, 2013 (Glaspy).

Throughout its decades in the tort system, Garlock had sophisticated in-house personnel dedicated to managing Garlock's asbestos litigation and a nationwide roster of outside defense counsel.[87] In 1996, Garlock formed a separate company to manage its asbestos liability, Garrison Litigation Management Group, Ltd., one of the Debtors in this proceeding.[88]

* * *

As is clear from the foregoing, Garlock's experience in the tort system was emblematic of that of large asbestos defendants. It made dangerous products and was sued by thousands of persons injured by them. While it was able to remain at the fringes of asbestos litigation for some years, the changing mix of defendants and disease types eventually moved Garlock to the forefront. There Garlock defended itself vigorously, winning some cases and losing some, but most often settling cases cost-effectively to avoid trial risk. In the end, however, with its insurance dwindling and mesothelioma claims continuing, Garlock filed for bankruptcy.

[87] ACC-7; ACC-9; ACC-10.

[88] Grant Dep. 26:9-13, Nov. 1, 2011.

ARGUMENT

I. ESTIMATING GARLOCK'S AGGREGATE ASBESTOS LIABILITY

A. The Legal Framework of the Estimate

The goal of this estimation proceeding is "a reliable and reasonable estimate of the aggregate amount of money that Garlock will require to satisfy present and future mesothelioma claims." Est. Order ¶ 10. Consistent with fundamental bankruptcy principles, the Court must determine what it would cost Garlock to resolve present and future asbestos claims if it were not in bankruptcy. *See In re Federal-Mogul Global, Inc*, 330 B.R. 133, 158 (D. Del. 2005) (object is to determine "what a claim would have been worth but for the bankruptcy").[89]

While the Court has stated that it is undertaking an estimation "for allowance purposes pursuant to section 502(c)," (Est. Order, ¶ 9), it has qualified that purpose significantly: "The court does not expect to 'allow' any individual or group of claims. Rather, it proposes to estimate the aggregate amount necessary to satisfy present and future claims that may be allowed at some later point in the case." Est. Order, ¶ 11. This qualification preserves the rights of claimants and recognizes the jurisdictional limitations of the bankruptcy court. To conduct allowance proceedings for purposes of distribution would implicate individual claimants' due process rights. A bankruptcy court is precluded from liquidating or estimating contingent or unliquidated personal injury or wrongful death claims against the estate for purposes of distribution. 28 U.S.C. §§ 157(b)(2)(B) and 157(b)(5). *See also* 28 U.S.C. § 1411(a) (preserving

[89] Bankruptcy law does not allow the bankrupt to use the fact of its bankruptcy to reduce the pre-petition claims of its creditors. In the *Owens Corning* case, for example, the commercial creditors argued that the claims should not be valued as they had been in the tort system pre-bankruptcy but, instead, by the claims resolution criteria that might be adopted by a post-bankruptcy trust. The district court rejected this argument, holding that "the claims are to be appraised on the basis of what would have been a fair resolution of the claims in the absence of bankruptcy." *Owens Corning v. Credit Suisse Boston*, 322 B.R. 719, 721-22 (D. Del. 2005).

in bankruptcy claimants' right to jury trial of personal injury tort and wrongful death claims). However, "an estimation of asbestos liability for the limited purposes of plan formulation is a fruitful endeavor because it promotes the speed and efficiency goals of the Bankruptcy Code, while not implicating the procedural rights of the individual claimants." *Federal-Mogul*, 330 B.R. at 154-55.

Although the Court must make the best estimate that the record and sound judgment permit, perfection is not possible. "[A]n estimation by definition, is an approximation." *Federal-Mogul*, 330 B.R. at 155. Especially where valuation requires "a prediction as to what will occur in the future, an estimate, as distinguished from mathematical certitude, is all that can be made." *Consolidated Rock Prods. Co. v. Du Bois*, 312 U.S. 510, 526 (1941). *See also Owens Corning*, 322 B.R. at 725 ("mathematical precision cannot be achieved").

In estimating liabilities where the interests of equity holders are pitted against those of creditors, the uncertainties inherent in estimation imply that the Court should be conservative in this sense: doubts should be resolved in favor of the creditors because their rights are superior, and they are entitled to be paid in full before equity may retain any interest. After all, Debtors and their parent are seeking through bankruptcy to cap Garlock's liability to involuntary asbestos tort creditors for all time. Congress enacted the Absolute Priority Rule in 11 U.S.C. § 1129(b) to meet "the danger inherent in any reorganization plan proposed by a debtor, then and now, that the plan will simply turn out to be too good a deal for the debtor's owners," and to ensure that debtors and insiders cannot "use the reorganization process to gain an unfair advantage." *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 444 (1999).

B. Dr. Peterson's Estimate Should Be Adopted

1. Dr. Peterson uses a well-known method accepted by courts nationwide

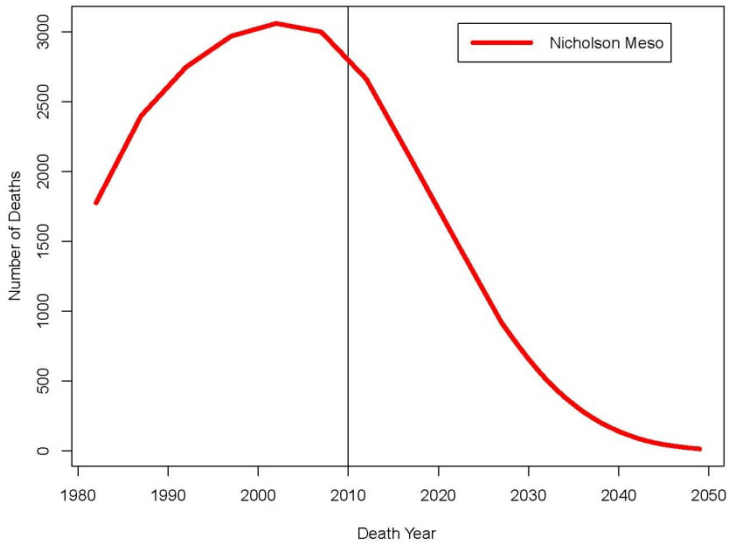
Dr. Peterson uses what has become the standard method for estimating asbestos liability for both legal and financial purposes.[90] It was first adopted in *In re Eagle-Picher Indus., Inc.*, 189 B.R. 681 (Bankr. S.D. Ohio 1995). Since then, every court that has completed an asbestos liability estimate has focused on the debtor's "historical claims-handling practices, and expert testimony on trends and developments in the asbestos tort system." *Federal-Mogul*, 330 B.R. at 155. Accordingly, Dr. Peterson makes use of Garlock's decades-long history of resolving asbestos claims as recorded in Garlock's own claims database. Pending and future claims are estimated separately, although the steps are similar.

To estimate pending claims, Dr. Peterson first determines the number of pending mesothelioma claims from the Garlock database.[91] He then reviews Garlock's settlement history during a "calibration period" to determine the percentage of claims that are likely to be paid by Garlock rather than dismissed (referred to as the payment rate), and to determine the average settlement value for those claims that are paid. Estimation of pending claims is then a straightforward calculation:

[90] *See* Trial Brief of the Official Committee of Asbestos Personal Injury Claimants for Estimation of Pending and Future Mesothelioma Claims, filed July 10, 2013 [Dkt. No. 3024]; Response and Opposition of the Official Committee of Asbestos Personal Injury Claimants to Debtors' Motion to Exclude or Strike Committee and FCR Estimation Witness Opinions, filed September 27, 2013 [Dkt. No. 3153 –under seal] ("**Pre-Hearing Br.**"), § II.A.

[91] Hr'g Tr. 3882:22-3883:7, Aug. 8, 2013 (Peterson).

Estimation of Garlock's liability for future asbestos claims proceeds along similar lines. Two extra steps are required, however. First, an additional step is needed to predict how many mesothelioma claims Garlock will face in future years. Dr. Peterson does this by using the well-known forecast by Dr. William J. Nicholson and others at Mt. Sinai Hospital of the number of people who will die from asbestos-related mesothelioma in the United States through 2030.[92] Using a standard mathematical technique, Dr. Peterson extends that prediction to cover additional years through 2049. The forecast predicts the following incidence curve:



Not every person stricken with mesothelioma in the future will bring a claim against Garlock. To estimate what fraction will, Dr. Peterson divides the number of mesothelioma claims Garlock received during the calibration period by the incidence of mesothelioma during that period.[93] This fraction is mesothelioma victims' "propensity to sue" Garlock.

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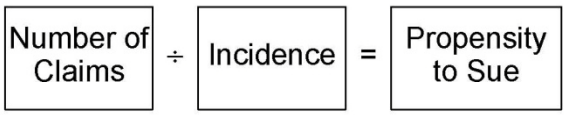
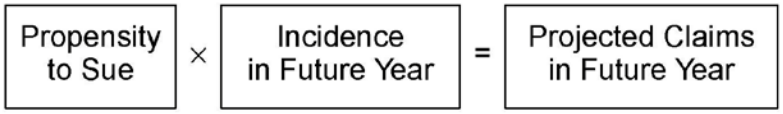
[92] W.J. Nicholson et al., *Occupational Exposure to Asbestos: Population at Risk and Projected Mortality – 1980-2030*, 3-3 Am. J. Indus. Med. 259, 259-311 (1982). "The Nicholson Study has been shown to be remarkably accurate over time." *In re Armstrong World Indus., Inc.*, 348 B.R. 111, 126-27 (D. Del. 2006).

[93] Hr'g Tr. 3891:6-18, Aug. 8, 2013 (Peterson).



The number of mesothelioma claims Garlock will face in each future year is then estimated by multiplying Nicholson's projected number of mesothelioma deaths in that future year by the propensity to sue.[94]



These projected future claims against Garlock are then valued using the same formula that is used for pending claims. Average settlement values are, in future years, adjusted for inflation. The result is a series of estimates of the nominal amount Garlock would pay in each future year through 2049.

The final step is to reduce these future payments to a present value.[95] This is done using discount rates supplied by a financial expert. In the present case, Dr. Peterson used discount rates provided by Mr. Kenneth W. McGraw of Charles River Associates. Mr. McGraw determined that a risk-free discount rate was required, and calculated that rate with reference to U.S. Treasury securities with maturities that correspond to the future years in which payments will occur.[96]

Dr. Peterson's estimation method has been used for decades, both in legal proceedings and in the financial and corporate communities. The method has been frequently used for

[94] *Id.* at 3893:3-23.

[95] *Id.* at 3890:1-13.

[96] Expert Report of Kenneth W. McGraw, dated February 15, 2013 ("**McGraw Report**") (ACC-937) at 3-9.

planning and financial reporting by companies that face asbestos liabilities.[97] Indeed, Garlock and its corporate parents have used essentially this same method for almost 20 years, beginning with Coltec in connection with a tax issue in the mid-1990s.[98] Garlock's current ultimate parent, EnPro Industries, Inc., used a variant for its periodic internal management estimates of Garlock's asbestos related liability until 2010.[99] So, too, did Dr. Charles Bates, Garlock's estimation expert here, when he prepared estimates of Garlock's asbestos liabilities for EnPro's quarterly and annual financial reports from 2005 until Garlock filed for bankruptcy in 2010.[100]

2. Dr. Peterson estimates Garlock's present and future mesothelioma liability to be $1.26 billion

Dr. Peterson applied the method described above and arrived at a preferred forecast of Garlock's present and future asbestos liability of $1.265 billion.[101] Dr. Peterson chose as his preferred calibration period the interval 2006 to May 2010.[102] Because this period is the most recent period of settlement history prior to bankruptcy, it is the period most likely to resemble

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[97] *E.g.*, Crown Holdings, Inc., Annual Report (Form 10-K) at 38 (Mar. 1, 2013) ("Projected future claims are calculated based on actual data for the most recent five years. Outstanding and projected claims are multiplied by the average settlement cost of those claims for the most recent five years."); Ingersoll-Rand PLC, Annual Report (Form 10-K) at F-44 (Feb. 14, 2013) (describing "methodology used to project the Company's total liability for pending and unasserted potential future asbestos-related claims" based on epidemiological studies estimating the number of people likely to develop diseases such as mesothelioma, propensity to sue based on most recent three-year claims history, and the average settlement and resolution value of claims for the most recent three years).

[98] *See, e.g.*, ACC-171.

[99] *E.g.*, ACC-621 (EnPro Indus., Inc., 2008 10-K) at 88.

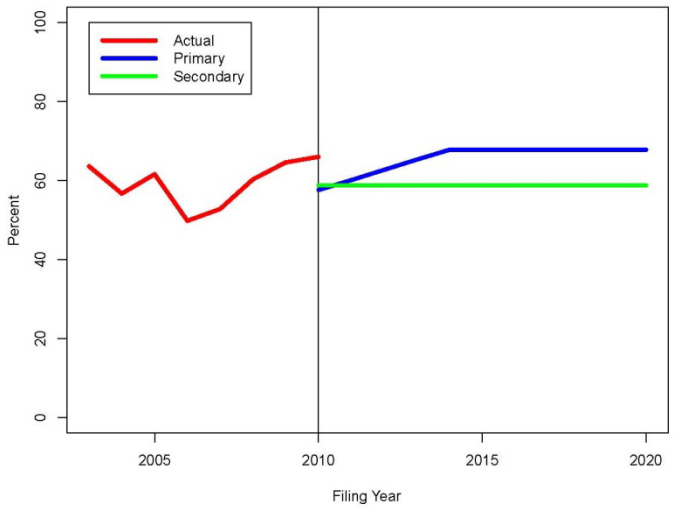
[100] Hr'g Tr. 2877:18-2878:11, Aug. 5, 2013 (Bates).

[101] Hr'g Tr. 3903:13-17, Aug. 8, 2013 (Peterson). As part of his work, Dr. Peterson also made a secondary forecast analysis using somewhat different parameters. Hr'g Tr. 3901:16-3902:13, Aug. 8, 2013 (Peterson).

[102] Hr'g Tr. 3884:7-16, Aug. 8, 2013 (Peterson). Garlock filed for bankruptcy on June 5, 2010.

what Garlock would continue to experience were it not in bankruptcy.[103] Furthermore, an analysis of mesothelioma settlement values and payment rates showed that prior to that interval, payment rates had been trending down and settlement values had been trending up. The 2006-May 2010 interval was the most stable in this respect.[104]

Dr. Peterson's estimate uses average settlement amounts and payment rates from this 2006 to May 2010 calibration period.[105] For propensity to sue, Dr. Peterson begins with the average from the calibration period and then continues an upward trend in the propensity to sue that existed in that period. This upward trend continues for approximately four additional years.[106]



The graph above demonstrates that, in Dr. Peterson's preferred model, the propensity to sue, the blue line, begins at a lower level than the last actual propensity to sue, and does not rise above

[103] *Id.*

[104] Hr'g Tr. 3885:20-3887:20, Aug. 8, 2013 (Peterson).

[105] Hr'g Tr. 3902:3-5, Aug. 8, 2013 (Peterson).

[106] The secondary estimate applies the propensity to sue from the period 2003 to 2010 without any upward trend. *Id.*

that level. This is because the trend is derived by averaging the propensities to sue for the calibration period, rather than simply building on Garlock's experience in the final year or two outside of bankruptcy. If anything, this effectively understates the actual trend.

Dr. Peterson increases future settlement payments by a 2.5 percent inflation rate and then reduces those future payments to present value using a discount rate provided by the Committee's financial expert, Kenneth W. McGraw. Future payments are discounted to present value to express the estimate of Garlock's claims as if they were paid on the date of its bankruptcy filing. The appropriate discount rate for this procedure, according to both Mr. McGraw and relevant case law, is a "risk free" rate.[107] The task is to measure the present value of future indemnity payments. Because tort claimants are not investors who voluntarily choose to expose themselves to investment risk to achieve a higher return, the only appropriate discount is one that adjusts for the time value of money, to the exclusion of any further discount for any risk of default in payment. As calculated by Mr. McGraw, the risk free rate is based on US Treasury securities with maturities corresponding to the years in which future payments would be made.[108] For Dr. Peterson's forecast, this method yields an effective average discount rate of 3.251 percent.[109]

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[107] McGraw Report at 4-5; *Jones & Laughlin Steel Corp. v. Pfeifer*, 462. U.S. 523, 537-38 (1983), quoting *Chesapeake & Ohio R. Co. v. Kelly*, 241 U.S. 485, 491 (1916); *Federal–Mogul*, 330 B.R. at 164; *Eagle–Picher*, 189 B.R. at 692 (Bankr. S. D. Ohio 1995); *In re Specialty Prods. Holding Corp. (Bondex)*, 2013 WL 2177694, at *25 (Bankr. D. Del. May 20, 2013).

[108] McGraw Report at 7.

[109] Hr'g Tr. 3902:11-13, Aug. 8, 2013 (Peterson). The discount rate calculated by Mr. McGraw and applied by Dr. Peterson is closely in line with the rate accepted by the *Bondex* court. *Bondex*, 2013 WL 2177694, at *25. This is to be expected since Bondex filed for bankruptcy just weeks before Garlock and the liability forecast covers essentially the same span of years as the one in this case.

C. Garlock and Coltec's Criticisms of Dr. Peterson's Estimate Are Wrong

1. Garlock's attempts to disavow its own settlement history are misguided

Because Garlock's history of resolving asbestos cases reveals the magnitude of the liability it faces, Garlock has offered many arguments for dismissing that history in the course of this estimation proceeding. The Committee has refuted those arguments, and on several occasions, the Court has expressly acknowledged settlement-based estimates would be considered.[110] In connection with the estimation hearing, Garlock repeats these arguments with some new variations.[111]

As the Committee has demonstrated many times, courts estimating asbestos liabilities have concluded that an estimate should be founded on an asbestos debtor's historical claims-handling practices.[112] *See Federal-Mogul*, 330 B.R. at 155-56. *See also, e.g., Armstrong*, 348

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[110] Information Brief of the Official Committee of Asbestos Personal Injury Claimants, filed August 30, 2010 [Dkt. No. 452]; Memorandum of Law Setting Forth the Official Committee of Asbestos Personal Injury Claimants' (A) Limited Objection to Debtors' Motion for Estimation, and (B) Objection to Debtors' Motion for a Bar Date, filed January 12, 2012 [Dkt. No. 1791]; Est. Order; Response of the Official Committee of Asbestos Personal Injury Claimants and Joseph W. Grier, III, Future Asbestos Claimants' Representative, to the Renewed Motion of Debtors to Exclude Evidence of Debtors' Settlements under Federal Rule of Evidence 408, filed June 24, 2013 [Dkt. No. 2964]; Order Denying Renewed Motion of Debtors to Exclude Evidence of Debtors' Settlements under Federal Rule of Evidence 408, filed July 22, 2013 [Dkt. No. 3057 under seal].

[111] *See, e.g.*, Debtors' Brief in Support of Their Motion to Exclude or Strike Committee and FCR Estimation Expert Witness Opinions, [Dkt. 2990]; Debtors' Trial Brief and Summary of Evidence to Be Presented at Trial, filed July 8, 2013 [Dkt. 3002] at 2-27; Hr'g Tr. 12-14, July 22, 2013 (Opening).

[112] *See, e.g.*, Memorandum of Law Setting Forth the Official Committee of Asbestos Personal Injury Claimants' (A) Limited Objection to Debtors' Motion for Estimation, and (B) Objection to Debtors' Motion for a Bar Date, filed January 12, 2012 [Dkt. No. 1791]; Brief of the Official Committee of Asbestos Personal Injury Claimants and the Future Claimants' Representative as to the Nature and Scope of the Estimation Proceeding, filed March 2, 2012 [Dkt. No. 2008]; Response of the Official Committee of Asbestos Personal Injury Claimants to the Debtors' Brief *(Footnote continued on next page.)*

B.R. at 123-26; *Owens Corning*, 322 B.R. at 721-25; *Eagle-Picher*, 189 B.R. at 690-92. *Bondex*, 2013 WL 2177694, at *1. For the reasons discussed above and in its prior briefs, the Committee urges the Court to adhere to this standard methodology.

a. Garlock did not settle cases only to avoid defense costs

Garlock argues that settlements are an inappropriate basis for estimation because Garlock settled cases solely to avoid defense costs, not because of any real liability. According to the defense perspective, "[I]t was a product that didn't cause disease. So if you asked me, we shouldn't have paid anything. But because of the litigation costs, we were forced to pay."[113] Dr. Bates testified along the same lines that all cases settled for less than $200,000 reflected only Garlock's concern with defense costs, rather than liability.[114]

As an initial matter, the argument is simply inconsistent with the facts. Garlock's inside and outside counsel admitted in testimony that, along with cost considerations, Garlock settled to avoid the risk of adverse verdicts.[115] Garlock's internal documents concerning the rationale for settlements are replete with discussions of avoided risk of adverse verdicts, not simply avoided defense costs.[116] The argument is simply counterfactual and nonsensical. Indeed, when Bates White made this same argument on behalf of the debtors in *Bondex*, it was rejected. Judge Fitzgerald observed that while settlements may be entered in part to avoid defense costs, "we

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(Footnote continued from previous page.)
Concerning Scope and Purpose of Estimation of Mesothelioma Claims, filed March 23, 2012 [Dkt. No. 2052]; Pre-Hearing Br., § II.C.1.

[113] Hr'g Tr. 2533:16-19, Aug. 1, 2013 (Turlik); *see also* Hr'g Tr. 3207:24-3208:21, Aug. 6, 2013 (Magee).

[114] Hr'g Tr. 2767:19-24, Aug. 5, 2013 (Bates). Dr. Bates claimed that cases settled for more than $200,000 reflected some liability, but mostly defense costs. *Id*. at 2769:1-2770:10.

[115] *See* pp.13-17, *supra*.

[116] *See, e.g.,* ACC-754 at GST-EST-0556299.

cannot accept the proposition that Debtors' historical payments must or should be reduced by those amounts that Debtors now attribute to implicit defense costs." *Bondex*, 2013 WL 2177694, at *19.

Dr. Bates offered up a complicated calculation to support his claim that settlements below $200,000 are due solely to defense costs, but that work is flawed. Dr. Bates started with the assumption that "liability" varies with age. He then compared the effect of age on settlements above and below $200,000 using a regression technique, and concluded that only above $200,000 did settlements reflect "liability" because only there did age appear to have a substantial effect.[117] In fact, Dr. Bates' selection of the $200,000 threshold was arbitrary. Had Dr. Bates run the same analysis using a $10,000 threshold, he would have seen the same phenomenon and could have concluded on the same arbitrary reasoning that only settlements above $10,000 reflected "liability," while smaller ones did not.[118] In other words, his analysis did not show that $200,000 was a more meaningful number than $10,000. Furthermore, had Dr. Bates used his same method with other variables he considered predictors of liability, such as "living or dead" or jurisdiction of suit, his flawed logic would have forced him to draw a conclusion opposite to the opinion he offered the Court, *i.e.*, that settlements ***below*** $200,000 reflect liability more than those above that threshold do.[119] But the entire analysis is mechanical and meaningless. It is "smoke and mirrors" math.

[117] Hr'g Tr. 3945:2-10, Aug. 8, 2013 (Peterson).

[118] *Id.* at 3947:16-21.

[119] *Id.* at 3950:5-24.

b. Garlock settled with knowledge of the sources of plaintiffs' exposures and potential trust claims

Garlock next claims that, prior to bankruptcy, it was the victim of "systematic suppression of evidence" of exposure to the products of bankrupt entities.[120] The nature of this allegation has fluctuated during the course of the estimation proceeding. In its 2010 Information Brief, for example, Garlock complained that plaintiffs had structured asbestos trusts to permit plaintiffs to delay their trust claims, and that Garlock was thus unable to benefit from the "credit" of the trust payments.[121] In Garlock's opening statement at the Estimation Hearing, it distanced itself from that argument: "We're not complaining about delaying the trust claim. What the plaintiff is obligated to do is disclose the product exposures that support the trust claims."[122] However, Garlock then played video clips of depositions of plaintiffs' firms in which the timing of trust claims was addressed, clips which would seem to be most relevant to the version of the argument Garlock abandoned. In the end, however, the exact formulation does not matter. As will be shown below, no variation of the argument has merit.

Garlock attempted to use a handful of resolved claims—26 cases on its "RFA 1.A List" and a subset of 15 "Designated Cases" it targeted for discovery in this proceeding—to suggest that plaintiffs systematically withheld evidence of exposures to the products of bankrupt manufacturers. Garlock purports to have summarized these cases in a series of memoranda that its counsel provided to its expert and fact witnesses. [123] The claims in those memoranda are

[120] Hr'g Tr. 66:21-67:1, July 22, 2013 (Opening).

[121] Information Brief of Garlock Sealing Technologies, LLC, filed June 7, 2010 [Dkt. No. 24] at 65-66.

[122] Hr'g Tr. 73:1-4, July 22, 2013 (Opening).

[123] Garlock has provided to the Court a version of the memoranda it provided to counsel during the Estimation Hearing, entitled Debtors' Summary of Evidence Regarding Certain RFA List *(Footnote continued on next page.)*

simplistic and wrong, and a detailed counterstatement is set forth in an Appendix accompanying this brief.[124] Rather than repeating those details here, the discussion that follows outlines the major flaws of Garlock's analysis.

i. Plaintiffs readily acknowledged non-Garlock asbestos exposures

To begin with, plaintiffs did not "deny" insulation exposures. The discovery responses and deposition testimony of the plaintiffs contain numerous references to such exposures and the circumstances surrounding their contacts with insulation products. Some were able to give the brand names of certain specific insulation products.[125] In fact, Garlock's industrial hygienist expert John Henshaw, who reviewed more depositions of current claimants than any other witness who testified in the case (over 500), admitted that many plaintiffs did testify to the names of specific insulation products.[126] Where a plaintiff was unable to do so, however, it is not evidence of "suppression" or discovery misconduct. Those plaintiffs still alive at the time of the discovery were sick and dying. Given the long latency period of mesothelioma, their

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(Footnote continued from previous page.)
1.A Cases (GST-8011). The Committee objects to the admission of such memoranda as evidence because they are not accurate and neutral compilations of the records summarized as required by Federal Rule of Evidence 1006 and applicable case law. *United States v. Janati*, 374 F.3d 263, 272-73 (4th Cir. 2004). Rather, they contain inferences and opinions which make them at most pedagogical devices that may be used by a party pursuant to Federal Rule of Evidence 611(a) but which, like demonstratives, are not themselves admitted as evidence.

[124] The counterstatement is attached as **Appendix II**.

[125] *See, e.g.*, GST-1853 (Beltrami Dep.) at 192:25-193:11 (identifying Certainteed and Manville); *See, e.g.*, ACC-6201 (Weikel Dep. in the *Torres* case) at 193:21-194:11; 195:18-196:18; 197:18-20; 200:14-201:16 (identifying Kaylo insulation, which was produced by Owens Corning, as well as asbestos products produced by numerous other bankrupts, including Johns-Manville, Celotex, Carey, and A.P. Green); ACC-6042 (Marley Dep. in the *Massinger* case) at 39:11-13 (identifying Worthington pumps); GST-2756 (Videotaped Trial Testimony of Robert Flynn) at 42:16-24 (identifying exposures to Babcock & Wilcox and Foster Wheeler boilers).

[126] Hr'g Tr. 911:5-912:8, July 25, 2013 (Henshaw).

asbestos exposures typically occurred decades before. Once installed, most insulation products are not branded and give no visible indication of what companies made them.[127] Workers who did not personally install insulation are unlikely to have known which brands were present in their workplaces.[128] They were unlikely to know the brand name of insulation material when they worked near it because it did not matter to them; they are even more unlikely to know thirty years later.

While Garlock's witnesses claimed that plaintiffs should have remembered brand names, not just types of products, the evidence shows that "brand name" testimony was not required to allocate responsibility to someone else. In those few RFA 1.A Claims or Designated Cases that involved trials, Garlock sometimes succeeded in apportioning a substantial share of liability to others without regard to the specific brand of products involved. In the *Treggett* case, for example, Garlock was able to place 39 percent of the responsibility on the U.S. Navy, on the theory that it was responsible for having specified the use of asbestos insulation in ships on which Mr. Treggett served.[129] Union Carbide was found 45 percent liable on the *Torres* verdict, on the ground that, as the owner of the facility where Mr. Torres worked, it was answerable for the asbestos to which Mr. Torres was exposed there. [130]

At other trials, Garlock had brand name information but chose not to use it. At the hearing, Mr. Turlik was confronted with the *Blandford* case. The *Blandford* plaintiff's interrogatory responses named Carey, Mundet, Fibreboard, Owens Corning, and Pittsburgh

[127] Hr'g Tr. 1441:5-1442:13, July 29, 2013 (Longo).

[128] Hr'g Tr. 3457:19-3458:1, Aug. 7, 2013 (McClain).

[129] GST-5452 at GST-EST-0494812.

[130] ACC-397 at 8.

Corning pipe-covering insulation products, as well as Kaiser refractory products, W.R. Grace fire-proofing, and Babcock & Wilcox insulated boilers, as sources of asbestos the deceased victim had been exposed to as a steamfitter working at a steel plant from 1959 to 1990.[131] The products named included Kaylo (Owens Corning's widely used insulation) and Unibestos (Pittsburgh Corning's amosite pipe covering with an extraordinarily high concentration of amosite asbestos compared to most insulation products).[132]

The judge in the *Blandford* case gave Garlock free rein to refer at trial to the deceased victim's exposures to any non-Garlock asbestos products, specifically including those of bankrupt insulation manufacturers like Owens Corning and Pittsburgh Corning.[133] The testimony of the plaintiff's product identification witness, who worked alongside the victim in the same trade, specifically placed the dusty asbestos insulation and cement products in their "breathing zone" and affirmed that the victim had breathed that dust.[134] Yet, in Garlock's closing argument to the jury, its attorney used the name Kaylo in passing only twice.[135] He mentioned Unibestos and the other named asbestos products not at all.[136] Instead, the defense attorney emphasized the "miles and miles" of insulated pipe[137] and six massive hearths (each 150 feet long) "covered completely with asbestos"[138] that loomed over the plaintiff in his work as a

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[131] Hr'g Tr. 2481:20-2484:5, Aug. 1, 2013 (Turlik). GST-1881 at GST-EST-0166500-02, 0166568-73.

[132] Hr'g Tr. 2483:1-9, 2484:14-2485:2, 2488:10-2492:20, Aug. 1, 2013 (Turlik).

[133] *Id.* at 2498:5-23. *See* GST-1874 at 6:6-8:3.

[134] Hr'g Tr. 2489:8-23, 2494:1-13, 2496:6-22, Aug. 1, 2013 (Turlik).

[135] *Id.* at 2499:16-2502:9. *See* GST-1875 at 69:16, 70:15, 70:17.

[136] Hr'g Tr. 2500-01, Aug. 1, 2013 (Turlik).

[137] *Id.* at 2557:25-2558:1. *See* GST-1875 at 65:20-21.

[138] Hr'g Tr. 2502:24, Aug. 1, 2013 (Turlik). *See* GST-1875 at 70:3.

steamfitter. Garlock's closing argument contrasted those huge exposure sources to the smallness of the gaskets the decedent had handled and what the defense attorney characterized as the *de minimis* asbestos fibers that can have escaped from the gaskets when cut or removed.[139] No matter who made the pipe covering or the boiler insulation, it was Garlock's argument that its gaskets could not have caused disease. Garlock's insistence now that the key to its defense and favorable settlement of mesothelioma claims was plaintiffs' naming of specific insulation products is an after-thought.

ii. Plaintiffs' non-Garlock asbestos exposures and trust claims were no surprise to Garlock

Even if plaintiffs were unable to recite the brand names of non-Garlock products that they were exposed to, Garlock had access to a wealth of information about plaintiffs' non-Garlock exposures. Garlock was well represented by able counsel who could use the tools available to discover a plaintiff's exposures. Even the most basic discovery reveals enough information about a claimant's exposure profile to understand what products that claimant encountered. For example, standard interrogatory answers would reveal the occupation, time period and sites at which an injured person worked.[140] Garlock's counsel maintained databases of discovery conducted in past cases, and used these resources to identify what products had previously been identified at job sites.[141] As a result, using just basic information, Garlock knew a substantial amount about a plaintiff's non-Garlock exposures.[142] In addition, Garlock could ask the plaintiff questions at deposition or trial, and conduct its own research, investigation, and third-party

[139] Hr'g Tr. 2499:16-2503:2, Aug. 1, 2013 (Turlik). *See* GST-1875 at 89:10-12.

[140] *E.g.*, ACC-196; *see also* Hr'g Tr. 2340:1-2342:8, Aug. 1, 2013 (Turlik).

[141] Hr'g Tr. 2341:3-18, Aug. 1, 2013 (Turlik).

[142] Hr'g Tr. 3199:12-16; 3200:9-23, Aug. 6, 2013 (Magee).

discovery designed to establish the presence of non-Garlock asbestos containing products at a claimant's job sites. Sometimes, Garlock took these steps.[143] Sometimes it did not. To the extent Garlock took a passive role and decided, for its own reasons, to forego the opportunity for discovery, it cannot fairly be heard to complain now.

Garlock had a similar ability to understand what trust claims a plaintiff had made or would likely make. As an initial matter, trust claims have been discoverable in many jurisdictions since at least the mid-2000s.[144] Garlock was well aware of asbestos bankruptcies and trusts.[145] Indeed, Garlock hired Robinson Bradshaw at approximately the same time to, among other things, monitor asbestos bankruptcies and trusts, and to pursue "indirect claims" for contribution against trusts.[146] Bates White monitored asbestos trusts and incorporated the assumptions about the effects of trust claims into its estimates for Garlock's asbestos liability.[147] Nevertheless Garlock's attempts to obtain information about trust claims in tort litigation were sporadic at best. For example, after California courts sustained objections to his attempts to discover trust claims in the early 2000s, Garlock's outside counsel David Glaspy did not

[143] *See, e.g.*, Hr'g Tr. 2340:1-2342:8, Aug. 1, 2013 (Turlik).

[144] *Id.* at 2336:4-10. *E.g., Porter Hayden Co. v. Bullinger*, 713 A.2d 962, 969 (Md. 1998); *In re Eighth Judicial Dist. Asbestos Litig. (Malcolm v. A.W. Chesterton Co.)*, No. 2002-10666, slip op. at 2 (N.Y. Sup. Ct. Dec. 30, 2005); *Volkswagen of Am., Inc. v. Super. Ct. of S.F.*, 43 Cal. Rptr. 3d. 723 (Ct. App. 2006). *But see Sweredoski v. Alfa Laval, Inc.*, No. PC2011-1544, slip op. at 16-17 (R.I. Super. Ct. July 15, 2013) (trust claims not discoverable).

[145] Hr'g Tr. 3244:14-3246:7, Aug. 6, 2013 (Magee).

[146] Hr'g Tr. 2344:20-2345:2, Aug. 1, 2013 (Turlik); Grant Dep. 59:15-63:4, Dec. 12, 2012; ACC-28 at Exh. A; ACC-29.

[147] *E.g.*, ACC-149 (EnPro Indus. Inc. 2007 10-K) at 26; Hr'g Tr. 2882:18-23, Aug. 5, 2013 (Bates).

routinely attempt to obtain them, despite a California appellate court's decision in 2006 rendering them discoverable.[148]

Setting aside direct discovery of trust claims, Garlock was well aware of what trust claims a plaintiff could make. As noted above, in the tort system, Garlock generally settled claims after at least some discovery.[149] Occupation, time period, and site alone would be sufficient to establish that a plaintiff would be entitled to file trust claims at numerous trusts. Many trusts publish approved site and occupation lists, based on evidence amassed by their predecessors during their years in asbestos litigation.[150] These documents are published and available on websites maintained by the trusts. They identify work places where their predecessors' products are acknowledged to have been present and job functions that are known to have routinely brought workers into contact with those products. Claimants can use these lists to qualify for payments from the trusts in appropriate circumstances.[151] Likewise, by studying a claimant's work history and the information made public by the trusts, litigating defendants can readily discern what trust recoveries may be anticipated for a given claimant. Bates White, which worked with Garlock from 2005 onwards, developed a line of business using asbestos trusts' public information to create precisely these kinds of analyses.[152]

Indeed, Garlock could determine not only the likelihood that a plaintiff would make a claim to a trust and be paid, but also the likely amount of a settlement payment by the trust. In

[148] Hr'g Tr. 4656:25-4657:17, Aug. 22, 2013 (Glaspy).

[149] Hr'g Tr. 2242:14-23, July 31, 2013 (Turlik), Hr'g Tr. 2356:20-25, Aug. 1, 2013 (Turlik). In some cases Garlock settled before any discovery. *Id.* at 2356:20-2357:24. Voluntarily foregoing discovery is inconsistent with claims that someone else withheld information.

[150] Hr'g Tr. 3710:21-3714:7, Aug. 7, 2013 (Patton).

[151] *Id.* at 3709:18-3714:5.

[152] Mahoney Dep. 175:4-178:2, Feb. 26, 2013; Hr'g Tr. 2901:14-2902:10, Aug. 5, 2013 (Bates).

the tort system, under procedures followed in almost all jurisdictions, settlement amounts paid by co-defendants were disclosed to Garlock only if it took a verdict.[153] Asbestos trusts, by contrast, publish their court-approved Trust Distribution Procedures ("**TDP**"), which set forth their "payment percentages" (the percentage that their limited resources permit them to pay against the liquidated value of an accepted claim), and their scheduled values for each recognized type of asbestos disease (*i.e.*, their liquidated values assigned for claims that have been qualified by expedited review), their "maximum values" (*i.e.*, the most they will pay for an extraordinary claim), and their "average values" (*i.e.*, the liquidated values they aim to achieve across the aggregate of all accepted claims, under individual review as well as the more routine expedited review).[154] Garlock enjoyed, therefore, far more information about trust claims than it had about settlements with co-defendants in the tort system.

iii. Trust claims, bankruptcy ballots, and Rule 2019 filings are not evidence that plaintiffs "suppressed" exposures

Garlock's allegations of suppression of evidence depend heavily on Garlock's assumption that the filing of a trust claim signals that the claimant him or herself has evidence of exposure to the product of the bankrupt company that set up the trust. But a trust claim is not equivalent to evidence of exposure. First, a "bare bones" claim can be filed without being completed, or a claim may be deemed deficient if it is not substantiated by exposure evidence satisfying the trust's criteria for payment.[155] Second, trust claims may be made based on presumptive exposure criteria, such as the site lists mentioned above.[156] Using a site list, for

[153] Hr'g Tr. 3621:14-3622:10, Aug. 7, 2013 (Rice).

[154] *E.g.*, GST-1547.

[155] Hr'g Tr. 3714:8-3717:14, Aug. 7, 2013 (Patton).

[156] *Id.* at 3709:18-3710-18; Hr'g Tr. 3604:18-3605:12, Aug. 7, 2013 (Rice).

example, a claimant diagnosed with mesothelioma might need only to establish that he or she was working at a listed site at a particular time in a particular occupation in order to be paid by a trust.[157] Apart from those pieces of information (routinely disclosed in the tort system) and the existence of the trust's site list (a fact equally available to Garlock), the claimant and his counsel may well know nothing else germane to the particular trust claim.[158] Such a claim requires no evidence or representation by the claimant other than that he worked at an approved site at a pertinent time and in a relevant occupation. For these reasons, courts have recognized that asbestos defendants seeking to apportion liability to bankrupt entities cannot prove the bankrupt's responsibility merely by introducing the plaintiff's trust claims.[159]

Garlock's defense attorneys, Mr. Turlik and Mr. Glaspy, both acknowledged at the hearing[160] that to place a bankrupt on the verdict sheet in a tort suit, the defendant must make out a *prima facie* case of that entity's liability in tort, including specific causation.[161] Garlock's

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[157] Hr'g Tr. 3709:18-3714:5, Aug. 7, 2013 (Patton).

[158] If a claimant needs further proof of exposure, his or her counsel must search elsewhere for that proof.

[159] *See Scapa Dryer Fabrics, Inc. v. Saville*, 16 A.3d 159, 179 (Md. 2011) ("One will not be considered a joint tortfeasor, however, merely because he or she enters a settlement and pays money."); *In re Asbestos Litig.*, No. 2004-03964, slip op. at 5-6 (Tex. Dist. Ct. Jan. 16, 2009) (letter order from MDL Judge Davidson) (materials submitted to a trust are generally insufficient to establish that the trust is a responsible third party, because the trusts do not generally require any proof of causation let alone proof sufficient to satisfy the rigorous standard required under Texas law).

[160] Hr'g Tr. 4652:6-4656:9, Aug. 22, 2013 (Glaspy); Hr'g Tr. 2378:10-2380:23, Aug. 1, 2013 (Turlik).

[161] *See, e.g., Sparks v. Owens-Illinois, Inc.*, 38 Cal. Rptr. 2d 739, 748-50 (Ct. App. 1995) (the named defendant bore the burden of presenting evidence and arguing that other equally defective products were concurrent causes of Sparks's mesothelioma); *In re N.Y.C. Asbestos Litig.*, 2012 WL 3642303, at *21 (Sup. Ct. Aug. 20. 2012) ("defendant seeking to apportion liability to non-party companies . . . has the burden of showing that the negligence of those companies was a 'significant cause of plaintiff's injuries' and proving the 'proper amount of equitable shares *(Footnote continued on next page.)*

witnesses also insisted that the presence of the bankrupt's product at the plaintiff's work site does not establish causation under tort law because it does not show that the product emitted dangerous fibers in the plaintiff's "breathing zone."[162] Unlike a litigating defendant, a Section 524(g) trust has no interest in putting claimants to the burden of proving facts established by abundant proof in prior cases. Approved site lists, then, embody presumptions established by trusts that claimants may legitimately rely upon in the context of filing and settling claims against those trusts, despite having no personal knowledge or independent proof of exposure to products for which the trusts bear legal responsibility. Yet many of the trust claims Garlock cites as "proof" of suppressed exposure evidence rely on site lists or similar presumptions.[163] Many other claims rely on work site information or other discovery materials provided to Garlock in the tort system.[164] Such claims provide Garlock no exposure information to which it did not already have access.[165]

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attributable to the other companies.'"); *see also* Hr'g Tr. 3468:5-13; 3468:18-3470:19; 3471:2-18, Aug. 7, 2013 (McClain).

[162] Hr'g Tr. 2380:11-23, Aug. 1, 2013 (Turlik); Hr'g Tr. 3300:18-3301:3, Aug. 6, 2013 (Magee).

[163] All three of Mr. Torres' trust claims, for example, rest on his having worked at Union Carbide, which was on the approved site list for each of the trusts. *See* Appendix II at 53-55; GST-4927 (Torres B&W Claim); GST-4928 (Torres DII [Halliburton] Claim); GST-4929 (Torres Owens Corning Claim). Claims based on site lists or similar presumptions abound in the Designated Cases. *E.g.*, GST-3692 (Massinger USG Claim); GST-2778 (Flynn AWI Claim); GST-3609 (Homa Raymark Claim); GST-6045 (Williams AC&S Claim); GST-4470 (Taylor Fibreboard Claim).

[164] *See e.g.* GST-5488 (Treggett Keene Claim); GST-5490 (Treggett Porter Hayden Claim); GST-4181 (Reed Combustion Engineering Claim); GST-4192 (Reed Raybestos Claim); GST-6044 (Williams ABB Lummus Claim); GST-4353 (Steckler ABB Lummus Claim); GST-4354 (Steckler AC&S Claim); GST-4367 (Steckler Keene Claim); GST-4369 (Steckler Raybestos Claim); GST-4463 (Taylor AC&S Claim); GST-4468 (Taylor Combustion Engineering Claim).

[165] Garlock has always been free to explore the trusts' repositories of documents accumulated in their predecessors' asbestos litigation for evidence of where their products were disseminated. Mr. Rice described how Section 524(g) trusts succeed to such documents as part of their *(Footnote continued on next page.)*

Concededly, some of the designated claimants filed trust claims not based solely on approved sites. A few of the filings by three claimants included affidavits by the claimant or others that appear inconsistent with the claimant's deposition testimony in his tort suit.[166] The Court has not heard the in-court testimony of the affiants or any other witnesses with personal knowledge of how the affidavits came to be. The claimants have died, and Garlock did not depose the other affiants or call them to the stand at the hearing. Thus, any inconsistencies between the affidavits and the discovery responses given by the claimants remain unexplained. Because neither the claimants nor the other affiants are parties to this proceeding, moreover, the affidavits are nothing more than hearsay as far as the aggregate estimation is concerned.[167] While the Committee does not object to the Court's admitting them into evidence for the simple fact that the statements were made, the Court cannot properly accept the affidavits as establishing the truth of assertions they contain. And if Garlock offers them merely to show inconsistencies with the claimants' testimony given elsewhere, their probative value is minimal, especially where the affiants demonstrably lacked direct personal knowledge of the matters asserted and their statements conflicted with the claimants' documented work histories.[168]

(Footnote continued from previous page.)
predecessor's permanent exit from the tort system. *See* Hr'g Tr. 3604:11-17, Aug. 7, 2013 (Rice).

[166] *See* Appendix II at 25-26, 33, 66-67.

[167] "'Hearsay' means a statement that: (i) the declarant does not make while testifying *at the current trial or hearing*; and (ii) a party offers in evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c) (emphasis added). For estimation, the affidavits in question are not non-hearsay admissions of a party opponent because the claimants are not parties to this proceeding.

[168] For example, Mrs. White stated in her affidavit that her husband, Mr. White, was exposed to asbestos while working on two ships at the Norfolk Naval Shipyard. But the social security records of her deceased husband, Charles White, show that he did not work there, but rather at the Norfolk Shipbuilding and Drydock. His own testimony was to the effect that those were two
(Footnote continued on next page.)

Garlock makes another error when it attempts to equate bankruptcy ballots to admissions of exposure.[169] As the Committee's witnesses explained, ballots filed in asbestos bankruptcies reflect at most a determination by counsel that a claimant *might* have a claim affected by the bankruptcy plan creating the trust, not that they have evidence in hand of exposure to the products of the bankrupt entity.[170] At a fundamental level, this result is determined by 11 U.S.C. § 524(g), which requires an affirmative vote of a supermajority of persons whose claims would be channeled to the asbestos trust created by the plan. To effectuate a reorganization and insulate the debtors and any other protected party effectively, the plan and channeling injunction must sweep in all manner of claims, not just those based on exposure to a product made by the debtor. To avoid disenfranchising affected claimants, then, the vote on such a plan must encompass potential claimants broadly, not just those who happen to have fully worked up their claims against the bankrupt defendant forming the trust.[171] Accordingly, voting procedure orders and ballots, when read carefully and in context, require only that that claimant have a good-faith basis to believe they might have a claim against the trust on any theory.[172] And because, at that point, the trust has not been established and presumptions such as site lists have not been finalized, claimants must have some latitude to vote without having proof in hand of exposure to

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different operations located at different places but that people often mistakenly referred to the one as the other. GST-5612 at 21:24-22:4. Yet Garlock finds it convenient to assume that the widow's second-hand account must be accurate and that the victim's own direct testimony about his exposures must be false. *See* Hr'g Tr. 3085:10-16, Aug. 5, 2013 (Magee).

[169] Hr'g Tr. 3682:13-3683:10, Aug. 7, 2013 (Patton).

[170] *Id.* at 3691:21-3694:7.

[171] *Id.* at 3692:3-18.

[172] *Id.* at 3693:6-18.

the product for which the trust is responsible.[173] In practice, as well as in theory, that is how plaintiffs vote claims. Plaintiffs counsel explained that they generally completed bankruptcy ballots for clients if they could not rule them out as potential claimants against the given debtor or its trust.[174]

Finally, to add to its tale of discovery abuse in the tort system, Garlock counts as evidence of discovery failures any Rule 2019 statement identifying a client in an asbestos bankruptcy. Until recently, Rule 2019 statements were required to inform the court and other parties of the identity of a lawyer's clients when the lawyer acts for multiple entities in a bankruptcy case.[175] Law firms' Rule 2019 statements in a bankruptcy case are not statements about claimants' exposure to the products of the bankrupt.[176] To treat them as such is simply incorrect.

Garlock's inappropriate treatments of trust claims, ballots and Rule 2019 statements constitute the bulk of Garlock's "evidence" that claimants are failing to disclose exposures to the products of bankrupt entities. When the realities of trust claims, ballots, and Rule 2019 statements are fully taken into account, however, Garlock's argument fades away.

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[173] *Id.* at 3693:19-3694:7.

[174] *See, e.g.*, Waters & Kraus 30(b)(6) Dep. (Kraus) 85:4-24, 87:4-88:18, 90:16-25, 92:6-93:8, 95:15-96:18 (Jan. 14, 2013).

[175] Hr'g Tr. 3788:5-18, Aug. 8, 2013 (Patton).

[176] *Id.* at 3788:5-18. *See also, In re ACandS, Inc.*, 462 B.R. 88, 97 (Bankr. D. Del. 2011) (Fitzgerald, B. J.), *rev'd on other grounds sub nom. In re Motions for Access of Garlock Sealing Techs. LLC*, 488 B.R. 281 (D. Del. 2013). ("A 2019 statement is a statement by a lawyer [It] doesn't give you any information about what evidence the clients have in support of their claims and it doesn't tell you whether the lawyer actually is ultimately even going to file a claim in the case").

iv. Garlock's flawed claims about particular cases have no wider significance for the estimation

Garlock did not select its featured cases as a random sample, but singled them out from more than ten thousand resolved mesothelioma claims.[177] By any standard, the 26 "RFA 1.A Claims" amount to a tiny fraction of Garlock's historical claims experience. And the 15 Designated Cases together amount to just 7.1 percent of the 210 RFA 1.A Claims, which according to Mr. Magee encompass the lion's share of "high value" resolutions ever paid by Garlock to mesothelioma claimants. Even if the picture Garlock paints of the Designated Cases were substantially true, which it is not, there would still be no basis for treating them as representative of any broader set, much less of the universe of "high value" claims against Garlock.[178]

Garlock has not attempted to recreate fairly the circumstances of cases long since resolved, a task that would challenge even the most objective observer. Mesothelioma tort actions are complex. If it were appropriate to revisit their merits, which it is not, this would call for reviews of the individual cases far more detailed and painstaking than this Court can perform or should attempt in the context of aggregate estimation. Some of the Designated Cases were resolved as long ago as 2005. Few of the key participants in those cases testified in person or by deposition in the estimation proceeding, and the claimants themselves are dead. Nor is the documentary record relevant to non-Garlock exposures in these cases complete. Garlock does not pretend to have assembled, much less presented and analyzed, the entire record in any of the

[177] Hr'g Tr. 3222:12-3223:14, Aug. 6, 2013 (Magee).

[178] Indeed, adding up all cases ever brought by the few law firms that have any plaintiff on the RFA 1.A list produces a total that is less than five percent of the historical mesothelioma claims Garlock faced. Hr'g Tr. 3970:7-3971:25, Aug. 8, 2013 (Peterson).

cases. For example, the materials that have been produced reference other, unproduced documents that would bear on what the parties knew. Garlock's own expert reports on asbestos materials in particular classes of Navy ships could show that Garlock was well aware of the presence of non-Garlock products on ships where plaintiffs served, and hundreds of depositions of workers at the Brooklyn Naval Yard could put non-Garlock products at that site in great detail.[179] Furthermore, none of Garlock's witnesses studied even the incomplete records from the Designated Cases in enough depth and with sufficient independence for the Court to repose confidence in their conclusions. Indeed, the Garlock witnesses who spoke about these matters at the Hearing (Messrs. Turlik, Glaspy, and Magee, Professor Brickman, and Dr. Bates) relied uncritically on the memoranda prepared by Robinson Bradshaw,[180] which are permeated with advocacy that visibly infected the witnesses' testimony. Professor Brickman, for example, testified that he did not have time for such a review, so he merely "spot-checked" counsel's work.[181] He even found it necessary to carry a Robinson Bradshaw memorandum with him to the witness stand and to consult it from time to time when testifying,[182] all the while presuming to make the broadest generalizations and the harshest pronouncements about asbestos claimants and their lawyers. This parody of expert testimony underscores the unfairness of revisiting individual cases in a proceeding in which neither the claimants nor their counsel are parties.

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[179] *See* Appendix II at 43.

[180] Hr'g Tr. 2326:15-2327:2, 2349:5-13, 2427:16-2428:1, 2474:18-2475:5, 2475:19-2477:5, 2509:9-2510:8, Aug. 1, 2013 (Turlik); Hr'g Tr. 3351:21-3352:11, Aug. 6, 2013 (Magee); Hr'g Tr. 1300:24-1302:2, 1309:18-24, July 26, 2013 (Brickman); Hr'g Tr. 2860:15-25, Aug. 2, 2013 (Bates).

[181] Hr'g Tr. 1206:22-1207:6, July 26, 2013 (Brickman).

[182] *Id.* at 1249:12-16, 1259:23-1260:3.

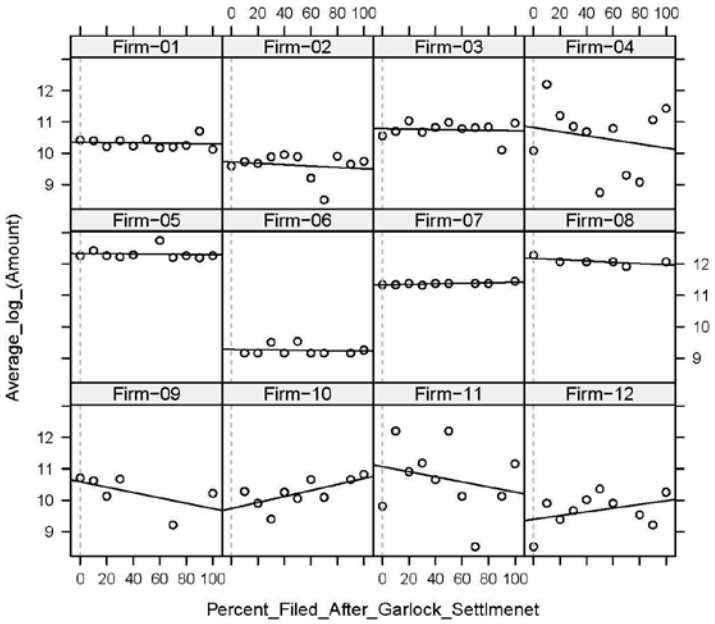
c. Garlock's settlement values were not affected by the timing of trust claims

Unsurprisingly, given that both plaintiffs and defendants in the tort system had a working understanding of what exposures a plaintiffs would have and what claims could be made to trusts, there is no evidence that the timing of plaintiffs' claims to trusts had any effect on the settlement amounts Garlock paid. That is, Garlock settled for the same amount whether claimants filed trust claims before or after settling with Garlock. Even if a particular plaintiff law firm usually did wait to file trust claims for clients until after they had settled with Garlock, there is no evidence that such a practice had any systematic effect on the amount of Garlock's settlement payments to that firm's clients.

As Dr. Peterson showed at the estimation hearing, Dr. Bates' analysis purporting to demonstrate such an effect was flawed because it mixed together settlements obtained by different law firms; the effect displayed by Dr. Bates was in fact a misleading use of averaging.[183] When Dr. Peterson examined the data on a law firm by law firm basis, no systematic advantage to delaying trust claim filings emerged. That is, overall, plaintiffs gained nothing and Garlock lost nothing when plaintiffs delayed trust claim filings. Specifically, Dr. Peterson examined settlement data for 12 firms, and for each firm plotted a graph which plotted varying settlement amounts against the timing of trust claims relative to settlement.[184]

[183] Hr'g Tr. 3965:4-20, Aug. 8, 2013 (Peterson).

[184] *Id.* at 3968:25-3969:15.



If plaintiffs had obtained any clear advantage from delaying trust claims until after settling with Garlock, the graphs would rise consistently from left to right.[185] As is evident from the graphs, that is not the case.

2. The trend in Dr. Peterson's forecast is appropriate

In his preferred forecast, Dr. Peterson applied an increasing trend to the propensity to sue until 2015, based on his analysis of the calibration period, 2006-May 2010. Dr. Bates criticized this trend, calling it "spurious."[186]

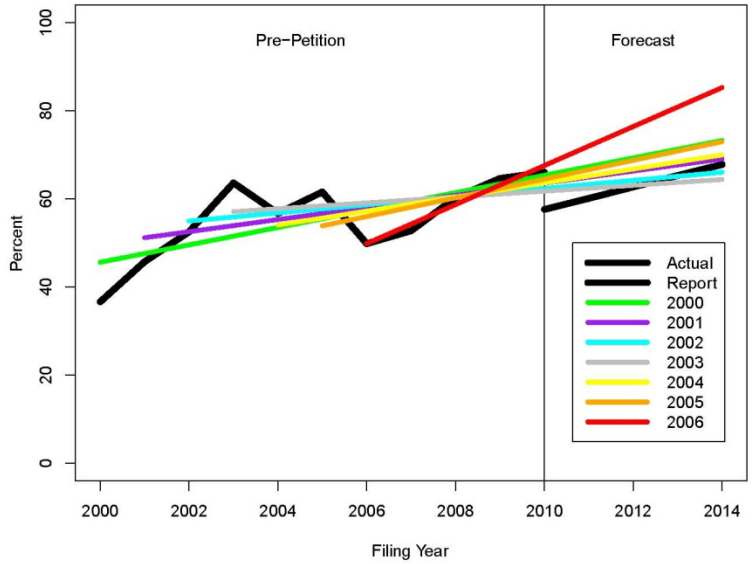
Both the trend and its causes were well documented, however. Garlock had become more visible in the litigation throughout the 2000s first, as plaintiffs developed their case against Garlock and, second, as other defendants sought refuge in bankruptcy.[187] Garlock's increasing

[185] *Id.*

[186] Hr'g Tr. 4763:3-23, Aug. 22, 2013 (Bates).

[187] Hr'g Tr. 3873:10-3874:18, Aug. 8, 2013 (Peterson); Mahoney Dep. 50:12-53:18, Feb. 26, 2013.

visibility is evident in the data throughout the 2000s as the likelihood Garlock would be sued by a mesothelioma victim trended upward.[188] Using a number of different starting points in the 2000s, rather than his preferred calibration period, Dr. Peterson demonstrated that a trend of increasing propensity to sue is a robust feature of Garlock's claims history.[189]



Alternative forecasts that use these different trend lines from the 2000s are, on average, higher than Dr. Peterson's forecast, which incorporates a more modest upward trend and gives effect to that trend at a lower starting point after bankruptcy than the actual propensity to sue as it existed in Garlock's last years before bankruptcy. To ignore the reality of the trend would be "spurious" and, if anything, Dr. Peterson's preferred forecast of future claims understates the impact of the trend.[190]

[188] Hr'g Tr. 2356:2-7, Aug. 1, 2013 (Turlik).

[189] Hr'g Tr. 3961:4-3962:17, Aug. 8, 2013 (Peterson).

[190] *Id.* at 3962:18-24.

3. Dr. Peterson applies appropriate inflation and discount rates

As part of his estimation method, Dr. Peterson increased average settlement amounts in future years by a forecasted inflation rate of 2.5 percent. This is a reasonable approximation of a future rate of inflation.[191] Indeed, Dr. Bates used that same figure in his own estimate.[192] Economic statistics support the figure. The average yearly percentage increase in the Consumer Price Index ("**CPI**") for the past 10 and 20 years have been 2.4 percent and 2.6 percent, respectively.[193] While there were some periods with lower inflation, and some periods with higher inflation, these periods have followed each other. As such, they average out over reasonable time frames. For example, the average five-year increase in the CPI for each five-year period from 1991 to 1995 through 2006 to 2010 is around 2.6 percent.[194] Notably the rate of increase in medical costs, which form a substantial part of the damages in a mesothelioma case, has generally been higher than this figure, rendering Dr. Peterson's inflation rate conservative in this respect.[195]

To discount the future payments back to present value, Dr. Peterson used a risk-free rate. This rate was supplied by the Committee's financial expert, Kenneth W. McGraw. Mr. McGraw used U.S. Treasury securities to determine the risk-free rate because Treasury securities are

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[191] McGraw Report at 6.

[192] Hr'g Tr. 2774:17-25, Aug. 2, 2013 (Bates); 4786:22-4787:4, Aug. 22, 2013 (Bates).

[193] McGraw Report at 6-7.

[194] *Id.* at 6.

[195] Between 1992 and 2012, the annual percentage increase in the price of medical care varied between 3.7 percent and 7.4 percent. Bureau of Labor Statistics, data series ID CUUR000SAM, *available at* www.bls.gov/cpi/data.htm.

accepted by financial markets as "risk-free."[196] The discount rate was calculated for each year of future payments forecasted by Dr. Peterson. The appropriate risk-free discount rates to apply to the future indemnity payments for each year are the yields reflected in the marketplace, as of the petition date, on U.S. Treasury securities of corresponding maturities. Taking account of the timing and relative weighting of the annual payments constituting the stream in Dr. Peterson's forecast, the year-by-year discount rates applicable are the mathematical equivalent of an overall discount rate of 3.251 percent.[197] Interestingly, in the *Bondex* case, a risk-free rate was used to discount future liabilities back to May 31, 2010, within two weeks of the equivalent date in this case. *Bondex*, 2013 WL 2177694, at *25. The court there found a blended rate of 3.45 percent was reasonable.

Dr. Karl Snow, Garlock's rebuttal expert regarding financial matters, took issue with Dr. Peterson's and Mr. McGraw's inflation and discount rate calculations. Dr. Snow first suggests that inflation should be measured by the spread between Treasury Inflation Protected Securities ("**TIPS**") and ordinary Treasury securities.[198] However, TIPS spreads are erratic and subject to potential distortions due to their limited market.[199] Dr. Snow also opined that, because a long-term measure of inflation was used, a long-term measure of the discount rate should also be used.[200] However, such an approach is not required by financial principles, and would ignore the real market year-by-year data concerning risk-free discount rates provided by Treasuries of

[196] McGraw Report at 4-6. For further discussion of the discount rate issue, see Pre-Hearing Br. at section II.C.2.

[197] McGraw Report Exh. 9.

[198] Rebuttal Report of Karl N. Snow, Ph.D., dated April 23, 2013 ("**Snow Rebuttal Report**") (GST-7239) at 28.

[199] McGraw Dep. 66:18-67:21, 74:16-75:17, June 14, 2013.

[200] Snow Rebuttal Report at 23.

varying maturities.[201] Finally, Dr. Snow suggested abandoning a risk-free rate altogether and instead basing a discount rate on Garlock's weighted average cost of capital or the rate of return that might be achieved by a pension fund investing its funds. [202] Such an approach, however, would violate applicable legal precedent requiring that involuntary tort creditors' claims be discounted only at a risk free rate.[203] Indeed, as Dr. Bates himself acknowledges that a risk-free rate should be used, the suggestion seems to be a transparent attempt to suppress the estimate.

4. Accounting for jurisdiction would increase, not decrease, the estimate

Garlock argues that Dr. Peterson's estimate was inflated because he did not take into account that current pending claims are distributed among states in a slightly different manner than claims were distributed in the calibration period, 2006 to 2010. Specifically, Dr. Bates suggested that if Dr. Peterson had adjusted for the difference, Dr. Peterson's forecast would have gone down. Dr. Bates purported to demonstrate his point by providing an analysis focused on two states, New York and California.[204]

Dr. Bates' criticism turned out to be incorrect. Dr. Peterson conducted a more comprehensive analysis of average settlement values taking into account not just the two states selected by Dr. Bates, but every state. For each state, he looked at what the average payment was in the calibration period and the number of settled and pending claims in each state, and then weighted these values. When differences among jurisdictions were accounted for in this manner,

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[201] Rebuttal to the Report of Charles E. Bates, Ph. D. by Kenneth W. McGraw, dated April 22, 2013 at 2-6.

[202] Snow Rebuttal Report at 31-41.

[203] *E.g.*, *Jones & Laughlin Steel Corp.*, 462 U.S. at 537-538, *Federal–Mogul*, 330 B.R. at 164; *Eagle–Picher*, 189 B.R. at 692; *Bondex*, 2013 WL 2177694, at *25.

[204] Hr'g Tr. 4780:1-4781:6, Aug. 22, 2013 (Bates).

the overall settlement average went up by 0.5 percent, not down.[205] Confronted with this analysis, Dr. Bates subsequently proposed a third way to take jurisdiction into account which he testified did show a jurisdictional effect like the one he originally posited. While such further contortions can no doubt produce different numbers, there has been no showing that the method of computing averages used by Dr. Peterson is incorrect in any material way.

5. Garlock's claim it has found "data processing errors" is wrong

Dr. Bates and Dr. Gallardo-Garcia claim that Dr. Peterson made certain data processing errors that affected his estimate. They are incorrect. First, they claim that Dr. Peterson failed to take into account information about the status of mesothelioma claims generated in the Mesothelioma Claim Questionnaire ("**MCQ**") process, such as claims that were dismissed or were not in fact mesothelioma claims.[206] Using MCQ data to remove claims in this way, however, produces a one-sided correction.[207] The MCQ process queried claims that were already identified as mesothelioma claim in the historical database. It did not address claims that were not recorded as mesothelioma claims in the database but should have been. For example, as a result of the design of the MCQ process we know if a claim recorded as a mesothelioma claims should have been lung cancer. But we do not know the converse—how many lung cancer claims should have been recorded as mesotheliomas, because no one sent lung cancer claimants a questionnaire. Nor did Dr. Bates apply known statistical techniques for estimating that number

[205] Hr'g Tr. 3963:7-3964:12, Aug. 8, 2013 (Peterson).

[206] Hr'g Tr. 4681:2-23, Aug. 22, 2013 (Gallardo-Garcia). For further discussion on the use of MCQ responses in estimation, see Pre-Hearing Br., § II.B.2.

[207] Hr'g Tr. 3959:3-6; 3960:7-10, Aug. 8, 2013 (Peterson).

of mesothelioma claims misrecorded in other disease categories in the Garrison database.[208] He would remove cases he believes are mischaracterized as mesothelioma, but not add cases that were miscategorized as non-mesotheliomas. To use MCQ data in that way would inappropriately suppress the mesothelioma count and skew the estimate downwards.[209]

Dr. Bates next objects that Dr. Peterson treats pending claims as being paid in one year, 2011.[210] However, the 2011 date is a convention used for ease of calculation.[211] In fact, Dr. Peterson assumed that the pending claims would be paid over three years, 2010-2012, which is generally equivalent, under his method, to the claims being paid in 2011.[212] While it is true that the 2011 convention affects the inflation adjustment and NPV calculations, the overall effect on the estimate is very small, less than one percent.[213]

Finally, Dr. Gallardo-Garcia complained that Dr. Peterson counted three verdicts in the wrong year by using the date of the last entry in the database relating to the verdict, rather than the date of the jury verdict itself.[214] On cross-examination, however, Dr. Gallardo-Garcia conceded that using the date of the jury verdict would not account for post-verdict appeals.[215] Verdicts were never paid on the date the jury announced them.[216] Garlock almost always

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[208] For example, by taking historical databases from different years one can see how the diseases recorded for claims change over time and construct what is known as a "transition matrix." Hr'g Tr. 3956:19-3959:12, Aug. 8, 2013 (Peterson).

[209] *Id.* at 3959:3-3960:21.

[210] Hr'g Tr. 4782:24-4783:4, Aug. 22, 2013 (Bates).

[211] Hr'g Tr. 3952:18-3953:3, Aug. 8, 2013 (Peterson).

[212] *Id.* at 3952:18-3953:10.

[213] *Id.* at 3953:4-10.

[214] Hr'g Tr. 4692:4-23, Aug. 22, 2013 (Gallardo-Garcia).

[215] *Id.* at 4741:21-4742:25.

[216] *Id.*

appealed, and if unsuccessful, paid two or three years later.[217] When dating settlements in his own analyses, Dr. Bates did not pick the initial settlement date, but the date of the largest payment on that settlement.[218] Using the jury verdict date here is simply an *ad hoc* adjustment designed to suppress the estimate.

6. Aggregate estimates of asbestos liability should apply realistic valuation principles to actual data and avoid theoretical flights of fancy

Dr. James Heckman suggested that it would be possible to use the learning in his discipline, economics, to construct an econometric model that would be useful in addressing the questions posed in this proceeding. In Dr. Heckman's vision, this would apparently involve a "well-established econometric framework" created in the 1930s.[219] The model would take into account, or at least might take into account, such factors as the value of expected settlement payouts, company solvency, medical documentation, evidence of exposure, types of products, the availability of funds from other firms and trusts, availability of insurance funds, venue, conduct of the defendant, laws governing the claim, and the plaintiff's expectations.[220]

Dr. Heckman, however, did not construct such a model.[221] Indeed, he has never made a forecast relating to asbestos claims.[222] In his own words, Dr. Heckman's role in the hearing was instead to "assess the forecasting approaches that have been by Dr. Peterson and Dr.

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[217] ACC-148 (EnPro Indus., Inc. 2004 10-K) at 84; Hr'g Tr. 3001:24-3002:1, Aug. 5, 2013 (Bates).

[218] Hr'g Tr. 4744:10-18, Aug. 22, 2013 (Gallardo-Garcia).

[219] Hr'g Tr. 4234:11-14, Aug. 9, 2013 (Heckman).

[220] *Id.* at 4271:6-4273:25.

[221] *Id.* at 4256:10-19.

[222] *Id.* at 4266:5-15.

Rabinovitz."[223] On that score, however, Dr. Heckman said he was not offering an opinion on whether the Court should be "comfortable accepting either Drs. Peterson's or Rabinovitz's estimates in this case," as he testified "I can't say who should be comfortable or shouldn't."[224] And Dr. Heckman is "not saying that Dr. Peterson's number's wrong."[225]

While it is of academic interest that Dr. Heckman can see in his mind the outlines of an econometric model that theoretically might provide answers to the kind of questions raised in proceedings like this one, the Court and the parties here are constrained by real limits on time and data. As discussed above, the law requires that estimations be practical. Courts around the country have relied on the estimation method used by Drs. Peterson and Rabinovitz; there is no need for this Court to scrap that court-approved method in favor of a new methodology that, so far at least, exists only in the mind of Dr. Heckman.

* * *

None of the criticisms leveled at Dr. Peterson prove to be substantial. Dr. Peterson's methods are straightforward and well-known. Garlock cannot rewrite or eliminate its own history. Dr. Bates' criticisms amount to the complaint that Dr. Peterson did not join him in using his new, flawed methods. And Dr. Heckman's ivory-tower theorizing provides no assistance to the Court or the litigants here. In short, Dr. Peterson's method and result should be adopted.

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[223] *Id.* at 4225:15-19. Dr. Heckman suggests at another point that Dr. Peterson's method may not be scientific. That critique is addressed in the Response and Opposition of the Official Committee of Asbestos Personal Injury Claimants to Debtors' Motion to Exclude or Strike Committee and FCR Estimation Witness Opinions, filed September 27, 2013 [Dkt. No 3153 – under seal].

[224] Hr'g Tr. 4260:14-4261:7, Aug. 9, 2013 (Heckman).

[225] *Id.* at 4269:16-18.

II. GARLOCK'S ATTEMPT TO USE BANKRUPTCY TO IMAGINE A NEW LEGAL SYSTEM WHERE IT FACES NO REAL LIABILITY FOR ITS CENTURY OF ASBESTOS USE FAILS LEGALLY, FACTUALLY, AND SCIENTIFICALLY

A. Dr. Bates' Novel Approaches to Minimize Garlock's Estimated Liability Are Flawed

In its effort to minimize its asbestos liability and preserve equity for Coltec, Garlock has had Dr. Bates abandon his prior estimation method and generate two new, different and much lower estimates. The first new method runs present and future claims through an imaginary and unrealistic "trial" process. The second purports to calculate the value of the claims under the bankruptcy plan offered by Garlock in late 2011. Neither provides the Court with a sound basis for estimating Garlock's claims.

1. Dr. Bates' principal method is unrealistic and unsound

Dr. Bates first constructed a new methodology that reduces his estimate of Garlock's present and future liability to a fraction of his previous estimates. While Dr. Bates suggested that this involved an elaborate estimation process with no fewer than 19 steps, Dr. Peterson replicated Dr. Bates' work using Bates White backup materials and showed that Dr. Bates' estimate was actually based on just four steps.[226] First, for present claims, Dr. Bates analyzed 367 miscellaneous jury verdicts—not necessarily Garlock verdicts—he found in news reports to see how they differed based on three variables—whether a plaintiff was alive or dead, the age of the plaintiff, and the state the plaintiff lived in—and then applied those results to forecast what a jury would award of each of the 3,932 pending mesothelioma claims against Garlock if they won

[226] Dr. Bates admitted this was correct on cross-examination. Hr'g Tr. 2923:22-2924:19, Aug. 5, 2013 (Bates).

against all entities to whose asbestos products they were exposed.[227] Dr. Bates then eliminates 1,755 of these pending claims based upon assumptions about who, in his view, would have exposure evidence against Garlock.[228] Next, Dr. Bates purported to eliminate the liability share he thought should be borne by solvent co-defendants and bankruptcy trusts. Dr. Bates derived this share by assuming that any mention of another company in the MCQ or elsewhere in discovery materials, trust claims, or bankruptcy balloting materials, was sufficient to establish liability and allocate to that company an equal share of liability in the trial.[229] Dr. Peterson explained that this step meant that Dr. Bates divided liability by 36, leaving Garlock with 1/36 of the liability of every case and eliminating 97 percent of liability.[230] Finally, Dr. Bates decided what percentage of cases plaintiffs would win. To derive this win rate, Dr. Bates relied on data from the 1990s, when plaintiffs won three out of 36 cases that went to trial against Garlock.[231] With this step, Dr. Bates eliminated 92 percent of any remaining liability for Garlock's on pending claims.[232] Dr. Peterson testified that Dr. Bates used more or less the same methodology for future claims, although Dr. Bates also simply eliminated a third of predicted future mesothelioma claims based on the unsubstantiated and highly controversial assumption that, in those cases, the claimants' mesotheliomas would not be related to asbestos.[233]

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[227] Hr'g Tr. 2925:1-2926:24, Aug, 5, 2013 (Bates); Hr'g Tr. 3908:2-3909:3, Aug. 8, 2013 (Peterson).

[228] Hr'g Tr. 3909:13-3910:1, Aug. 8, 2013 (Peterson).

[229] *Id.* at 3910:6-3911:17.

[230] *Id.* at 3911:10-23.

[231] *Id.* at 3911:24-3912:8.

[232] *Id.* at 3912:8-11.

[233] *Id.* at 3913:9-3914:14.

At each step, Dr. Bates applied assumptions embodying Garlock's long-standing litigation positions, effectively recrafting the tort system in the image of the Garlock defense team's preferences. As a result, Dr. Bates' "estimation" is not an estimate based on the existing tort system, but a thought experiment in which all key issues are resolved in Garlock's favor.[234]

a. The method imagines a world that does not and could not exist

Dr. Bates' method rests on several profoundly unrealistic premises. First, it assumes thousands of cases would be tried to verdict. Dr. Bates' present and future analysis contemplates almost 19,000 mesothelioma trials.[235] Using Dr. Bates' figure for defense costs of $500,000 per trial, those trials would cost $9.5 billion. If each trial took only five days—a low estimate—the trials would consume 95,000 days of court time. Of course, Garlock has actually tried only 83 mesothelioma claims to verdict over the last 20 years.[236] Clearly, Dr. Bates' method posits a wildly unrealistic number of trials.[237] Second, Dr. Bates assumes that each of his imaginary trials involves all entities to whose asbestos products the plaintiff was exposed, and that no defendant settles—neither Garlock nor any other defendant—when in fact both Garlock and most other defendants settle, rather than try, almost all cases.[238] Finally Dr. Bates assumes that all exposure information in the case comes from the plaintiff when its own counsel have testified

[234] Hr'g Tr. 2874:20-2876:6, Aug. 5, 2013 (Bates).

[235] Hr'g Tr. 3908:2-3909:25, Aug. 8, 2013 (Peterson); Hr'g Tr. 2973:15-2974:4, Aug. 5, 2013 (Bates); Hr'g Tr. 4840:19-25. Aug. 22, 2013 (Bates).

[236] ACC-519.

[237] Garlock's own management admitted that it would not have been possible for Garlock to try every case in the tort system because, even though Garlock had "more trial teams at the end than any other defendant in litigation," it "wouldn't have the trial teams to do it," and because "[t]he judges would not give you trial time to try the cases physically." O'Reilly Dep. 108:22-109:2, Feb. 2, 2013.

[238] Hr'g Tr. 2918:22-2919:14, Aug. 5, 2013 (Bates); Hr'g Tr. 3669:3-16, Aug. 7, 2013 (Rice).

that they took steps to discover exposure information elsewhere.[239] None of these premises reflect the way that asbestos personal injury cases are brought, tried, or resolved in the real world.

b. Dr. Bates throws out cases without adequate justification

At two points in his method, Dr. Bates throws out claimants without adequate justification. First, he eliminates 1,755 pending claimants based on the Mesothelioma Claimant Questionnaire. Specifically, he eliminates claimants for, among other reasons, failing to return a questionnaire form, for objecting that discovery is ongoing, or for reporting that they were represented by a different lawyer.[240] The questionnaires are not a legitimate basis for eliminating such claims. The questionnaires represented a "snapshot" of the pending claims as they stood when Garlock filed for bankruptcy and the automatic stay was imposed. The suggestion that every claimant already had exposure information ready on June 5, 2010 is unjustified. For example, one plaintiffs' counsel described how his settlement arrangement with Garlock limited his ability to answer the questionnaire. Under that arrangement, cases against Garlock were resolved at an early stage, which meant his firm had no reason to work up cases against Garlock.[241] Indeed, his firm had not conducted discovery in any case with Garlock since 1999.[242]

[239] Hr'g Tr. 2308:17-25, 2340:1-2344:8, Aug 1, 2013 (Turlik).

[240] Hr'g Tr. 2940:7-14; 2938:6-8, Aug. 5, 2013 (Bates); Hr'g Tr. 2913:7-16, Aug. 5, 2013 (Bates).

[241] Shepard Dep. 170:25-173:23, Dec. 4. 2012.

[242] *Id.* at 65:23-66:1.

Second, when predicting future claims, Dr. Bates eliminates one third of future mesothelioma victims on the theory that their mesothelioma would be idiopathic.[243] This is a highly contentious issue, at best.[244] There is little medical or scientific support for the idea that a third of mesotheliomas are caused by something other than asbestos.[245]

c. The verdict share calculation bears no relationship to the actual tort system or Garlock's own trial experience

Next, Dr. Bates assumes that liability for verdicts would be split evenly 36 ways, and therefore Garlock would pay only 1/36th of any verdict. In fact, both the assumption that the shares would be divided evenly and that there would be 36 shares are wrong. As to whether the verdict would be split evenly, Dr. Bates simply assumes away important variations of state law. In his direct testimony, Dr. Bates spent considerable time discussing various liability apportionment scenarios.[246] That is, Dr. Bates purported to consider how to account for the fact that, in some states, under the principles of joint and several liability, a defendant might bear the entire judgment in a mesothelioma case although there were other tortfeasors. That testimony, however, was just window dressing. Ultimately, Dr. Bates admitted that he did not present the results of any calculations under these various scenarios.[247] Instead, as Dr. Peterson revealed, he simply assumes Garlock would in each case be one of 36 entities found liable, and that liability would be split evenly among the 36 regardless of whether or not that verdict occurred in a state applying joint and several liability, and regardless of whether, because of bankruptcy or other

[243] Hr'g Tr. 3913:6-16, Aug. 8, 2013 (Peterson).

[244] *Id.* at 3913:17-3914:5.

[245] Hr'g Tr. 1865:10-1866:3, Jul. 30, 2013 (Brody).

[246] Hr'g Tr. 2802:14-2806:25, Aug. 2, 2013 (Bates).

[247] Hr'g Tr. 2935:3-24, Aug. 5, 2013 (Bates).

reasons, one or more of the co-defendants could not pay its full share of the verdict. In his magical universe, Dr. Bates simply granted Garlock's wish to eliminate joint and several liability.

Dr. Bates' calculation that Garlock would share a verdict with 35 other entities also represents a gross exaggeration. His figure assumes that the average verdict would be against Garlock, 13 other solvent co-defendants and 22 bankrupt entities or trusts.[248] The method by which Dr. Bates arrives at these numbers is an exercise in wishful thinking. First, Dr. Bates counts as responsible co-defendants any company referenced in discovery materials such as interrogatory responses or depositions.[249] But such a reference does not itself establish liability. As Garlock's own defense counsel confirmed, defendants have the burden of proving every element of a co-defendant's liability if they wish to allocate responsibility to that co-defendant.[250]

In arriving at his figure of 22 bankrupt entities with which Garlock would share a verdict, Dr. Bates looked to trust claims he found in MCQ responses, bankruptcy ballots, and Rule 2019 statements.[251] In adding up each of these categories, Dr. Bates errs. First, merely because someone makes a claim to a trust does not mean that the bankrupt company that formed the trust would have been assessed a share of the verdict in a trial. As the Committee's witnesses explained, not every claim to a trust is completed or paid, and many claims that trusts do pay are paid because of the application of presumptive exposure criteria such as site lists that do not

[248] *Id.* at 2949:2-4.

[249] *Id.* at 2946:22-2947:17.

[250] Hr'g Tr. 2378:6-16, Aug. 1, 2013 (Turlik); Hr'g Tr. 4652:224653:11, Aug. 22, 2013 (Glaspy).

[251] Hr'g Tr. 2950:5-24, Aug. 5, 2013 (Bates).

apply in the tort system.[252] Nor do bankruptcy ballots constitute admissions of exposure to products such that they could "count" as shares in a verdict.[253] They reflect at most a determination by counsel that a claimant he or she represents might have a claim affected by the bankruptcy plan creating the trust.[254] As plaintiffs' counsel explained, they generally completed bankruptcy ballots for a client with respect to a given reorganization plan if they could not rule out that the client might eventually claim against a trust created under the plan based on exposure to the debtor's products or otherwise. A far different standard would apply in testing liability in a tort suit.[255] Finally, a plaintiff's Rule 2019 filings in a bankruptcy case cannot inform anyone about whether or not the bankrupt would ultimately bear a share of liability for the plaintiff's injuries. Until recently, Rule 2019 filings were required to inform the court and other parties of the identity of entities a lawyer was acting for when representing multiple entities in a bankruptcy case, not whether those entities had suffered exposure to a debtors' products.[256]

Unsurprisingly, Garlock's actual verdict shares bear little resemblance to those used by Dr. Bates in his estimation approach. When Dr. Peterson calculated the actual number of shares in historical verdicts against Garlock, it was just 3.4 shares in the 1990s, and 2.0 shares in the

[252] Hr'g Tr. 3709:18-3710:20, Aug. 7, 2013 (Patton).

[253] *Id.* at 3682:13-25.

[254] *Id.* at 3691:21-3694:7.

[255] *E.g.*, Belluck & Fox 30(b)(6) Dep. (Belluck) 90:4-92:2, Dec. 14, 2012; David Law Firm 30(b)(6) Dep. (Cooper) 50:22-51:6, Feb. 1, 2013; Waters & Kraus 30(b)(6) Dep. (Kraus) 95:15-96:18, Jan. 14, 2013.

[256] Hr'g Tr. 3788:5-18, Aug. 8, 2013 (Patton). *See also, ACandS, Inc.*, 462 B.R. at 97. Rule 2019 was amended in 2011 in a way which relieves most asbestos creditors from having to file statements in the future.

2000s.[257] Through his inflated share assumptions alone, Dr. Bates deviated from reality by more than an order of magnitude.

The lack of realism in the "36 equal share" approach taken by Dr. Bates is also evident when one compares what a plaintiff might actually recover from trusts on realistic assumptions against the value Dr. Bates ascribes to the trusts' "share." As the Court is aware, asbestos bankruptcy trusts do not represent a new source of recovery for persons injured by asbestos. Each trust was once a company that paid cases in the tort system though settlements or verdicts. Once those companies filed for bankruptcy, the amount available for payment to asbestos creditors was reduced by the limits of financial resources of the now bankrupt company, and by the claims of other creditors. As a result asbestos trusts pay less, not more, than the subject company did pre-bankruptcy. Indeed, the trusts themselves incorporate a "payment percentage" to which the liquated amount of a trust claim is subjected, resulting in recovery of only part of the value listed in the trust. These payment percentages range widely, for example as low as .84 percent in the Raytech Trust to 40 percent in the Leslie Controls Trusts.[258] If one surveys 34 prominent asbestos trusts, the average recovery for a trust claim, taking into account payment percentages, is $20,907.[259] Even if one assumes, as Dr. Bates did, that the "average" plaintiff could recover from 22 trusts, that plaintiff would actually receive only $459,960. Dr. Bates, however, in his "share" analysis, ascribes more than 60 percent of his average verdict to such trusts, a share which amounts to $2.6 million. In the tort system, particularly in a state applying the traditional doctrine of joint and several liability, the solvent co-defendants would pay the

[257] Hr'g Tr. 3921:23-25, 3922:17, Aug. 8, 2013 (Peterson).

[258] ACC-782.

[259] *Id.*

$2.2 million shortfall after set-off.[260] In Dr. Bates' world, Garlock would be relieved of that responsibility.

d. The "win" rate is based on conditions from more than a decade ago that Garlock will never see again

Dr. Bates' use of an 8.3 percent "win rate" for plaintiffs against Garlock at trial is also unrealistic because it is based on data from the 1990s, results already a decade old at the time Garlock filed for bankruptcy. As noted above, the litigation environment for Garlock changed dramatically in the 2000s, as mesothelioma cases began to form a larger part of Garlock's case mix and plaintiffs developed their case against the company.[261] As a result, Garlock moved from being a peripheral defendant to a target defendant.[262] And as the Committee's experts explained, the transition from peripheral defendant to target defendant is not reversible; a defendant cannot return to obscurity once the case against it has been developed.[263] By looking to trial results from the 1990s as the basis for predicting plaintiffs' trial-success rate, Dr. Bates attempts to return to a past that will not come again.

The effect of correcting these errors is dramatic. Dr. Peterson demonstrated that Garlock lost 24.1 percent of trials, in the entire period from 1990-2010, and 36.2 percent of trials in the period from 2000-2010.[264] Dr. Peterson explained that when these historical values are used in

[260] In many jurisdictions, even application of the actual trust payments as a setoff is not automatic, but requires proof that a settling entity is a joint tortfeasor. *See, e.g., Baker v. ACandS*, 755 A.2d 664, 671-72 (Pa. 2000) ("a non-settling defendant is not entitled to a set-off in light of the settling defendant's release unless the settling and non-settling defendants are both deemed to be joint tortfeasors").

[261] *See* pp. 8-11, *supra*.

[262] Hr'g Tr. 3793:10-3796:3, Aug. 8, 2013 (Hanly).

[263] Hr'g Tr. 3435:10-18, Aug. 6, 2013 (Hanly).

[264] Hr'g Tr. 3922:12-19, 3923:8-9, Aug. 8, 2013 (Peterson).

Dr. Bates' formula, the value per claim increases dramatically.[265] Correcting just these errors and using the data for the entire period from 1990-2010 produces an estimate of $648 million under Dr. Bates' own method, rather than the $146 million that Dr. Bates postulated before correcting for present value.[266] Correcting the same errors and using data from the decade 2001-2010 produces a liability of $972 million under Dr. Bates' method, nearly as much as Dr. Peterson's estimates.[267] In short, Dr. Bates' "win rate" assumption is wrong, and dramatically so.[268]

e. As a result, Dr. Bates' method does not work

Unsurprisingly, given the unrealistic and counterfactual assumptions built into Dr. Bates' principal method, his method for predicting Garlock "liability" produces output that bears no resemblance to Garlock's actual results in the tort system. Dr. Peterson showed that Dr. Bates' method cannot, for example, predict historical payments from historical data.[269] For the 18 cases in which Garlock paid a mesothelioma claimant after a verdict, Dr. Peterson used Dr. Bates' method to see what it would have predicted, and then compared it to what Garlock actually paid.[270] The analysis produced the following results.

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[265] *Id.* at 3920:25-3923:14.

[266] *Id.* at 3925:22-3926:3.

[267] *Id.* at 3924:21-3925:22.

[268] Dr. Bates' "win rate" is overstated for another reason as well. In his second step, Dr. Bates removed claims he found lacking for medical or exposure reasons. Weeding out weaker claims would tend to increase the likelihood that remaining claims would succeed against Garlock. Dr. Bates, however, does not make any upward correction in the historical rate. As such he is essentially taking an improper double discount. Hr'g Tr. 3914:16-3915:5, Aug. 8, 2013 (Peterson).

[269] Hr'g Tr. 3926:8-14, Aug. 8, 2013 (Peterson).

[270] *Id.* at 3926:15-3928:1.

	Exhibit B Information			
#	Actual	Prediction	Ratio	Year
1	$0	$197,555	0.0	2001
2	11,890	139,508	0.1	2005
3	92,500	135,332	0.7	2004
4	137,500	58,381	2.4	2002
5	174,000	76,523	2.3	1998
6	190,000	151,137	1.3	2002
7	250,000	63,248	4.0	2002
8	298,834	187,793	1.6	2004
9	550,000	177,386	3.1	1995
10	561,611	74,232	7.6	2001
11	1,256,860	118,864	10.6	2002
12	1,389,050	256,798	5.4	1998
13	1,621,570	83,706	19.4	2002
14	3,418,925	238,782	14.3	2001
15	3,641,395	201,962	18.0	2004
16	3,931,932	130,021	30.2	2005
17	7,750,000	93,482	82.9	2005
18	9,000,000	225,550	39.9	2004
Total	$34,276,067	$2,610,260	13.1	

As is apparent, there is an enormous difference between what Dr. Bates' method would have predicted, and what Garlock paid, with actuals being on average 13 times higher than Dr. Bates' predictions. Confronted with this disparity, Dr. Bates strikingly conceded that this was ***because he was not forecasting actual trials, or the actual value of the claims in the tort system!*** [271] Indeed, far from replicating reality, Dr. Bates was instead forecasting an imaginary world where Garlock's preferences are assumed. Dr. Bates acknowledged that his analysis assumes that this Court would alter the tort system by imposing upon it an "alternative information regime."[272] Realism, however, requires this Court to estimate mesothelioma claims against Garlock in the tort system as it actually exists.[273]

[271] Hr'g Tr. 2968:11-2969:16, Aug. 5, 2013 (Bates); Hr'g Tr. 3929:19-3931:17, Aug. 8, 2013 (Peterson).

[272] Hr'g Tr. 4846:15-25, Aug. 22, 2013 (Bates).

[273] *See, e.g.*, *In re Coated Sales Inc.*, 144 B.R. 663, 668 (Bankr. S.D.N.Y. 1992) (estimation must be "based in reality"); *Consolidated Rock*, 312 U.S. at 526 (estimation should be as realistic as possible).

2. Dr. Bates' estimate under Garlock's plan is irrelevant

Dr. Bates presented an estimate of liability under the claims resolution procedures set forth in the Plan of Reorganization filed by Garlock in late 2011. This estimate is not helpful to the Court for two reasons. First, it is premature. How the asbestos creditors' entitlements may be adjusted under a plan of reorganization is an issue that may arise at a later stage in this case, but it has not been presented yet. To take Garlock's bankruptcy into account for estimation purposes now would introduce a premature, unjustified discount of the "face" amount of claims. The fact of the bankruptcy cannot be used to reduce the value of the claims faced by the debtor on the petition date.[274] In the *Owens Corning* case, for example, the commercial creditors argued that the claims should not be valued as they had been in the tort system pre-bankruptcy but, instead, by the claims resolution criteria that might be adopted by a post-bankruptcy trust. The district court rejected this argument, holding that "the claims are to be appraised on the basis of what would have been a fair resolution of the claims in the absence of bankruptcy." *Owens Corning*, 322 B.R. at 721-22. The law is clear that the Court is to measure the aggregate amount of the asbestos claims in the tort system, not "the value which claimants might take in satisfaction of their claims through some bankruptcy mechanism such as a trust of the sort provided for at § 524(g)." *Eagle-Picher*, 189 B.R. at 683.

Second, the estimate is irrelevant because, as a practical matter, Garlock's plan will not ever be implemented in its current form. As the Committee detailed in briefing regarding the

[274] For example, in a bankruptcy solvency analysis, a company's bonds must be valued at the face amount of the obligations, not discounted because of the debtor's financial distress and bankruptcy. *In re Trans World Airlines, Inc.*, 134 F.3d 188, 196-97 (3d Cir. 1998).

disclosure statement, the plan is unconfirmable for a variety of reasons.[275] Among these is the fact that the plan's classification scheme engages in gerrymandering and features a Case Management Order that would impose procedures differing radically from the allowance procedures prescribed by the Bankruptcy Code and that would deny the claimants their due process rights under the Code and the Constitution. Of course, to obtain § 524(g) protection for Garlock, the plan must be approved by at least 75 percent of asbestos creditors. 11 U.S.C. § 524(g)(2)(B)(IV)(bb). As Mr. Rice, co-chairman of the Committee, explained, the asbestos constituency seeks a plan that treats asbestos claimants fairly and respects constitutional and tort law principles governing claims. [276] Asbestos creditors are unlikely to approve a plan that, even as described by its propenents, is designed to overcome the tort system in ways that defendants have failed to achieve over more than a decade of political and legal effort.[277]

B. Garlock's Medical and Scientific Evidence Should Not Affect the Estimation

1. Garlock asserted the low-dose chrysotile defense in every mesothelioma case and it is reflected in settlement values and its trial record

This is a proceeding to estimate in the aggregate the value of pending and future mesothelioma claims against Garlock, not to decide the merits of any particular case or group of cases.[278] Scheduling orders governing the evidentiary hearing for the estimation have made clear

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[275] Objection of the Official Committee of Asbestos Personal Injury Claimants to the Debtors' Proposed Disclosure Statement, filed Jan. 19, 2012 [Dkt. No. 1808].

[276] Hr'g Tr. 3582:12-3583:6, Aug. 7, 2013 (Rice).

[277] Hr'g Tr. 1413:25-1415:15, Jul. 26, 2013 (Magee); Hr'g Tr. 3610:11-3622:16, Aug. 7, 2013 (Rice).

[278] As the Debtors' attorney, Mr. Harris, acknowledged in his opening statement, "[w]e're not asking the court to decide the merits of any individual claim, or decide any scientific issues here." Hr'g Tr. 18:25-19:1, July 22, 2013 (Opening).

that individual plaintiffs are not parties to the estimation proceeding, that no individual plaintiff's claim is going to be allowed or disallowed in the proceeding, that no individual was required to try his or her case in the estimation proceeding, and that no individual plaintiff was required to provide expert witness reports and expert testimony necessary to prove the merits of his or her claim against Garlock. Such litigation may occur in a different proceeding before a jury; but individual asbestos cases are not at issue in this proceeding. Indeed, and importantly, Garlock's estimation expert, Dr. Charles Bates does not rely on any of the medical or science evidence presented by Garlock in reaching any of his estimations.[279] Accordingly, this Court need not decide which medical or science experts are correct as to whether the ordinary and customary use of Garlock gaskets generated concentrations of asbestos dust capable of causing or contributing to mesothelioma.[280]

In truth, the so-called "low-dose chrysotile defense" to which Garlock devoted several days of the hearing was raised in every mesothelioma case that Garlock faced as a defendant in the tort system. David McClain, a plaintiffs' attorney, testified that Garlock asserted in all mesothelioma cases that the product did not emit asbestos and that, even if it did, the product was composed of chrysotile which does not cause mesothelioma.[281] Richard L. Magee, who served as EnPro's General Counsel and Garlock's senior in-house counsel, was intimately involved in the resolution of asbestos claims, confirmed that in defending its cases, Garlock commonly pointed to any evidence of amphibole exposure as the cause of the plaintiff's

[279] Hr'g Tr. 2903:11-25, Aug. 5, 2013 (Bates).

[280] In his opening statement, Mr. Harris conceded that the Debtors were "not asking the court to determine whether chrysotile is a cause of mesothelioma." Hr'g Tr. 27:21-22, July 22, 2013 (Opening).

[281] Hr'g Tr. 3464:7-20, Aug. 7, 2013 (McClain).

disease.[282] In fact, the low-dose chrysotile defense was always taken into account in deciding whether and at what price to resolve mesothelioma cases.[283] Thus, the strengths and weaknesses of the defense are already priced into historical settlement values, and no further adjustments to the estimation to account for that defense would be appropriate. *See Federal-Mogul*, 330 B.R. at 161-62.

2. The low-dose chrysotile defense is a question appropriate for individual claim determinations, not aggregate estimation

For more than thirty years, manufacturers of chrysotile asbestos products, including Garlock, have defended lawsuits involving their products by asserting the low dose chrysotile defense.[284] As Garlock's expert medical witness, Dr. David Weill, testified, there is ongoing debate in the medical literature between those that believe exposure to a low dose of chrysotile can cause mesothelioma and those that hold the opinion that exposure to chrysotile cannot cause mesothelioma except in extremely high doses.[285] Whether the foreseeable use of Garlock gaskets generated appreciable dust and whether that dust is capable of causing mesothelioma are factual questions for resolution in individual cases based on specific evidence presented by the parties in those litigations. And where the evidence implicates the defendant's products and includes appropriate expert testimony, causation issues are for a jury to decide.[286]

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[282] Hr'g Tr. 3087:21-3088:10, Aug. 5, 2013 (Magee).

[283] Hr'g Tr. 1385:17-1386:4, July 26, 2013 (Magee); Hr'g Tr. 3122:6-14, Aug. 5, 2013 (Magee); Hr'g Tr. 2531:2-9, Aug. 1, 2013 (Turlik).

[284] Hr'g Tr. 3642:24-3643:2, Aug. 7, 2013 (Rice).

[285] Hr'g Tr. 1048:3-1049:13, 1056:21-1057:6, 1058:2-23, July 25, 3013 (Weill).

[286] Hr'g Tr. 1239:13-1241:9, July 26, 2013 (Brickman); Hr'g Tr. 1058:19-23, July 25, 2013 (Weill).

3. The fabrication and removal of asbestos gaskets and packing generates concentrations of asbestos fibers substantially higher than what is found in the background ambient air

Garlock's low-dose chrysotile defense is premised, in part, on the testimony of the three industrial hygienists it brought to the hearing, Larry Liukonen, Fred Boelter and John Henshaw, regarding the amount of asbestos generated during the fabrication and removal of gaskets and packing. Simply installing a gasket without manipulation or opening a flange and having the gasket drop out would not result in any significant dust.[287] As the record reflects, the actual concentrations of asbestos dust measured during fabrication and removal of asbestos gaskets ranged widely from Mr. Boelter's "non-quantifiable" values of less than .007 f/cc,[288] to Larry Liukonen's 0.13 f/cc for hand scraping with no controls,[289] to the 1.3 f/cc average for the MAS fabrication studies,[290] to the MVA fabrication range of 2.2 to 2.3 f/cc,[291] to Dow Chemical's 2 to 5 f/cc range for cutting gaskets,[292] to the Industrial Hygiene Foundation study's finding of 4.58 f/cc for removing a Garlock sheet gasket,[293] to the MAS range for removal by a wire brush powered by an electric drill of 15 to 31 f/cc,[294] to the Dow Chemical power wire brush removal of 18 f/cc,[295] to the Shell Oil Company power wire brush removal of 28.4 f/cc.[296] The specific

[287] Hr'g Tr. 591:15-18, July 24, 2013 (Liukonen).

[288] Hr'g Tr. 674:24-25, July 24, 2013 (Boelter).

[289] Hr'g Tr. 584:5-8, July 24, 2013 (Liukonen).

[290] Hr'g Tr. 1475:6-13, July 29, 2013 (Longo).

[291] *Id.* at 1476:10-13.

[292] Hr'g Tr. 921:24-922:2, July 25, 2013 (Henshaw).

[293] Hr'g Tr. 1514:11-24, July 29, 2013 (Longo).

[294] *Id.* at 1499:14-1500:10.

[295] *Id.* at 1521:21-1522:2.

[296] Hr'g Tr. 604:4-605:6, July 24, 2013 (Liukonen).

level of airborne asbestos dust generated from work with gaskets and packing fluctuates due to the many variables associated with that work, including the size of the flange, the type of gasket used—full face or ring—the method used to remove the gasket, the thickness of the gasket and the temperature of the system in which the gasket was encased.[297]

The primary factor that dictates the level of asbestos dust generated by the removal of Garlock gaskets is the amount of residue left on the flange after the gasket is scrapped off.[298] In the MAS studies, for example, the concentration of asbestos dust measured during power wire brushing ranged from 0.3 f/cc when the gasket simply fell out and remained mostly intact to 21 f/cc when the gasket was tightly adhered.[299] Accordingly, the difference in the results of Dr. Longo's studies and those of Mr. Boelter is readily explained: the gaskets Mr. Boelter worked with were removed intact with little residue; by contrast, those in the MAS studies were tightly adhered to the flange face, necessitating the removal of substantial gasket residue by mechanical means.[300]

Regardless of where on that spectrum of exposures a worker's task falls, he or she will still be exposed to an amount of asbestos that substantially exceeds background levels. In fact, the potential inhalation of asbestos from the low end of occupational exposures to gaskets and packing is nearly a thousand times higher than any ambient air levels. For example, one day working in an environment with a concentration of 0.1 f/cc would lead to the potential inhalation

[297] Hr'g Tr. 1505:5-1507:4, July 29, 2013 (Longo).

[298] *Id.* at 1496:16-1497:4.

[299] *Id.* at 1504:13-1505:4.

[300] Hr'g Tr. 742:12-744:14, July 24, 2013 (Boelter); Hr'g Tr. 1494:23-1495:8, 1504:23-1505:4, 1522:14-1523:10, 1528:4-12, July 29, 2013 (Longo).

of 384,000 fibers compared to 432 fibers from a single day's worth of ambient air exposure.[301] At the higher levels of exposure caused by the removal of gaskets by power wire brushing, it would only take 41 minutes of that activity to inhale a lifetime's worth of asbestos at ambient air concentrations.[302]

4. Exposure to chrysotile, even at low doses, contributes to the development of mesothelioma

Whether the inhalation of asbestos dust generated from the fabrication and removal of Garlock gaskets is sufficient to cause or contribute to the development of mesothelioma is a medical question. To support its low-dose chrysotile defense, Garlock offered the testimony of three medical experts, Drs. David Garabrant, Thomas Sporn and David Weill, none of whom has a specialty in occupational medicine. Moreover, neither Dr. Sporn nor Dr. Weill has ever designed or published an original epidemiology study relating to asbestos exposed workers.[303] In fact, Dr. Sporn has never written any papers on the causation of asbestos disease and Dr. Weill has never written an article on mesothelioma.[304] Moreover, only two of Dr. Garabrant's 185 peer-reviewed publications involved the epidemiology of asbestos disease, one an unsuccessful attempt to use a job exposure matrix from registry data to find mesothelioma risk by occupation and the other a meta-analysis of the data of previously published studies, not original research.[305] He has written only four peer-reviewed articles that dealt specifically with asbestos disease.[306]

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[301] Hr'g Tr. 484:4-485:18, July 23, 2013 (Sporn).

[302] Hr'g Tr. 1752:6-1753:13, July 30, 2013 (Templin).

[303] Hr'g Tr. 443:15-17, July 23, 2013 (Sporn); Hr'g Tr. 1016:15-19, July 25, 2013 (Weill).

[304] Hr'g Tr. 443:18-21, July 23, 2013 (Sporn); Hr'g Tr. 1017:8-9, July 25, 2013 (Weill).

[305] Hr'g Tr. 314:3-316:5, July 23, 2013 (Garabrant).

[306] *Id.* at 314:3-12.

That these witnesses are quintessential "experts for hire"[307] is evident from their opinion that chrysotile asbestos is totally innocuous and incapable of causing any disease, including asbestosis, pleural plaques and mesothelioma.[308] Their opinion about chrysotile is not only contrary to the peer-reviewed published literature,[309] but is controverted by Garlock's own Material Safety Data Sheet that alerted workers that the chronic breathing of chrysotile asbestos from Garlock's gaskets could cause lung disorders such as asbestosis, pleural plaques, lung cancer and mesothelioma.[310] A telling indication of the weakness of their contentions regarding the inability of chrysotile asbestos to cause mesothelioma, however, is the fact that Kelly-Moore, a company that made joint compounds with chrysotile asbestos, concedes to juries that chrysotile can cause mesothelioma and that to contend otherwise is suggestive of fraud.[311]

In marked contrast to the qualifications of Drs. Garabrant, Sporn and Weill, the Committee's medical experts, Drs. C. Andrew Brodkin and Laura Welch, are both board-certified in occupational medicine. Dr. Arnold R. Brody has dedicated his research career to understanding how asbestos causes disease at the cellular level.[312] He has written over 130 peer-

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[307] Dr. Weill estimates that, as a litigation expert, he has earned more than $800,000 per year over the last three years and $4.5 million from 2002 until the present. Hr'g Tr. 1015:9-19, July 25, 2013 (Weill). Yet, he has never testified at trial or in a deposition on behalf of an individual claiming injury from exposure to asbestos. *Id.* at 1014:17-20. Dr. Garabrant has been involved in the litigation since the mid 1980s and has made somewhere between $5.95 million to $7.85 million as an expert witness. Hr'g Tr. 321:19-326:2, July 23, 2013 (Garabrant). He has only testified on behalf of a plaintiff in asbestos litigation once, in 1984. *Id.* at 318:24-319:2.

[308] Hr'g Tr. 425:5-17, 445:16-19, July 23, 2013 (Sporn); Hr'g Tr. 1019:21-1020:6, 1022:2-6, July 25, 2013 (Weill).

[309] Hr'g Tr. 2103:3-2104:2; 2106:24-2111:12, July 31, 2013 (Welch).

[310] Hr'g Tr. 451:19-452:4, July 23, 2013 (Sporn).

[311] Hr'g Tr. 3331:11-15, Aug. 6, 2013 (Magee); ACC-341.

[312] Hr'g Tr. 1821:21-1822:1, July 30, 2013 (Brody); Hr'g Tr. 1917:9-1918:5, July 30, 2013 (Brodkin); Hr'g Tr. 2078:19-23, July 31, 2013 (Welch).

reviewed scientific articles about asbestos and its health effects as well as fifty-five book chapters and proceedings that relate specifically to the molecular and cellular aspects of asbestos disease.[313]

Moreover, both Dr. Brodkin and Dr. Welch have been actively engaged in long-term epidemiological studies of workers exposed to asbestos, some of whom have been diagnosed with mesothelioma. Dr. Brodkin discussed his involvement as a co-investigator of the CARET study involving 4,000 workers, almost a thousand of whom were pipefitters.[314] Similarly, Dr. Welch testified about her work with 27,000 members of the sheet metal workers union and her many peer-reviewed publications addressing asbestos and disease growing out of that work. One of those articles was cited by the International Agency for Research on Cancer ("**IARC**"), an arm of the World Health Organization devoted to researching the causes of cancer, in its most recent monograph.[315]

The difference in qualifications between the Committee's medical experts and Garlock's medical experts is reflected in the strength of their testimony regarding the viability of the low-dose chrysotile defense. The Committee's medical experts persuasively rebutted the opinions of Garlock's medical experts that exposure to chrysotile asbestos dust and fibers from the use of Garlock gaskets and packing was incapable of causing mesothelioma. Well supported by a voluminous body of scientific literature, the Committee's medical experts testified that: i) chrysotile asbestos causes mesothelioma;[316] ii) there is no safe level of exposure to any type of

[313] Hr'g Tr. 1820:11-1821:7, July 30, 2013 (Brody); ACC-3562.

[314] Hr'g Tr. 1918:6-1921:24, July 30, 2013 (Brodkin).

[315] Hr'g Tr. 2083:9-2088:12, July 31, 2013 (Welch).

[316] Hr'g Tr. 1989:14-1990:1, July 30, 2013 (Brodkin); Hr'g Tr. 2111:8-12, 2128:2-18, July 31, 2013 (Welch).

asbestos, including chrysotile;[317] iii) exposures to asbestos as brief as a few days can cause mesothelioma;[318] iv) mesothelioma is caused by the cumulative amount of asbestos exposure, so that the more a person is exposed the greater the risk;[319] and v) asbestos exposures from fabricating and removing asbestos gaskets can result in concentrations of asbestos substantially in excess of what is found in background ambient air.[320]

Dr. Brodkin explained how medical evidence established a casual relationship between the use of gaskets and packing and the development of mesothelioma through the use of the Bradford Hill causation criteria, first with regard to chrysotile and then specifically with regard to the fabrication and removal of asbestos gaskets.[321] He concluded that chrysotile asbestos in gaskets and packing is a potent risk factor for mesothelioma.[322]

Dr. Welch testified that more than a dozen epidemiology studies conducted all over the world show an increased risk of mesothelioma in cohorts of people exposed to chrysotile asbestos.[323] Among the cohorts of chrysotile exposed workers she discussed were textile workers in China whose risk of falling victim to mesothelioma is thirty-three (33) times greater than that of the non-exposed population, as shown in a series of papers;[324] miners, millers and

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[317] Hr'g Tr. 1948:25-1949:21, July 30, 2013 (Brodkin); Hr'g 2128:17-2129:6, July 31, 2013 (Welch).

[318] Hr'g Tr. 2122:2-2123:25, July 31, 2013 (Welch).

[319] Hr'g Tr. 1948:6-24, 2004:9-19, July 30, 2013 (Brodkin); Hr'g Tr. 2148:4-2152:11, July 31, 2013 (Welch).

[320] Hr'g Tr. 1748:4-1753:13, July 30, 2013 (Templin).

[321] Hr'g Tr. 1951:5-1954:9, 1957:17-1958:1, 1961:1-21, 1967:7-1968:25, 1970:1-23, 1970:24-1971:22, 1973:1-16, 1979:7-1984:6, July 30, 2013 (Brodkin).

[322] Hr'g Tr. 1989:14-1990:1, July 30, 2013 (Brodkin).

[323] Hr'g Tr. 2113:8-2114:19, 2117:4-9, July 31, 2013 (Welch).

[324] *Id.* at 2117:10-2118:1.

other workers at a large open-air chrysotile mine in Balangero, Italy, who had a statistically significant excess incidence of mesothelioma not attributable to other mineral contaminants;[325] and a group of workers in a North Carolina textile mill where eight mesothelioma cases occurred in an environment where only two air samples out of 38,000 demonstrated the presence of a commercial amphibole fiber.[326]

With regard to fiber potency, Dr. Welch testified that many of the studies used to calculate potency differences are out of date. She showed that the chrysotile-exposed cohorts examined in those older studies now contain more mesothelioma cases than when they were studied in the late 1990s.[327] She also testified that in 2008, a Science Advisory Board convened by the Environmental Protection Agency to quantify the differences in fiber types concluded that the historical data were not sufficient to conclude that chrysotile asbestos is a less potent carcinogen than amphibole asbestos.[328]

Dr. Welch also testified that both analytical epidemiology and mesothelioma case series (such as the Skammeritz study and the Greenberg Davies study) demonstrate that asbestos exposures as brief as a few days cause mesothelioma in humans.[329] With respect to chrysotile specifically, she explained how the Madkour, Pan and Everatt studies establish that very low levels of chrysotile exposure, such as those experienced by persons living a mile away from a

[325] *Id.* at 2118:2-17.

[326] *Id.* at 2118:18-2121:10.

[327] *Id.* at 2145:2-2146:3.

[328] *Id.* at 2093:3-2094:7, 2095:7-2096:3.

[329] *Id.* at 2123:10-25.

chrysotile plant (*i.e.*, a cumulative exposure of 0.01 fiber per cubic centimeter) cause mesothelioma.[330]

If the question were presented for decision, the evidence would compel the conclusion that exposure to asbestos from Garlock's gaskets and packing can indeed cause or contribute to mesothelioma. The testimony of Dr. Welch, Dr. Brody, and Dr. Brodkin on these issues is far more credible than the testimony of Dr. Garabrant, Dr. Sporn and Dr. Weill. Drs. Brodkin, Welch and Brody are far better credentialed in the area of the asbestos and in the causation of asbestos diseases generally and mesothelioma specifically, than are Garlock's experts. Dr. Brody, Dr. Brodkin and Dr. Welch have dozens of peer reviewed publications relating to the cause of asbestos disease as compared to Dr. Garabrant's four publications and Dr. Weill's single letter to the editor, while Dr. Sporn has not published on these subjects at all. The literature confirming that chrysotile asbestos causes mesothelioma is extensive, and every scientific organization that has studied the issue has concluded that there is a causal relationship between chrysotile asbestos and mesothelioma.[331]

The merits or demerits of the low-dose chrysotile defense are not, however, properly presented for decision. The issue is, at most, background information for the aggregate estimation of mesothelioma claims against Garlock. For all of the reasons set forth above, it is clear that the evidence and opinions of Garlock's medical and science experts provide no basis for this Court to discount or reduce its estimate of Garlock's aggregate asbestos liability.

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[330] *Id.* at 2124:4-2126:17.

[331] Hr'g Tr. 1948:10-24, 1973:17-1975:21, July 30, 2013 (Brodkin); Hr'g Tr. 2111:8-2113:6, July 31, 2013 (Welch).

CONCLUSION

To estimate in the aggregate all pending and future mesothelioma claims against Garlock, Dr. Peterson has used the standard methodology employed by courts in every previous asbestos estimation and used outside of bankruptcy by trusts, insurance companies, corporations and their consultants, including Garlock itself and its estimation expert. This method is squarely based, as precedent requires, on Garlock's real claims resolution history in the tort system as it actually exists, in all its complexity. It also rests on the sound valuation premise that nothing is more comparable to the claims being estimated than claims for the same disease asserted and resolved in the five years leading up to Garlock's bankruptcy filing. Dr. Peterson's approach respects the imperative of realism in estimation; gives full effect to the extent that Garlock was able to dismiss claims in the tort system without payment; recognizes that, where dismissal was not to be expected, settlement of claims in groups, rather than trial, was by far the predominant mode Garlock actually used to extinguish claims; and draws upon the full spectrum of its settlements, high and low, rather than cherry-picking to manipulate the result. His calculations are open and fully explained.

On the other hand, Garlock seizes upon estimation not as a way of measuring the overall claims as they actually exist and will continue to arise, but as a strategy for escaping the brunt of them. Its approach begins by repudiating the results Garlock achieved in the tort system by virtue of intelligent and disciplined claims management strategies that minimized its risks and costs. To discredit that history, Garlock resorts to a campaign of distortion and revisionism, based on mischaracterizing the discovery conduct of plaintiffs in the tort system; ascribing to Rule 2019 statements, bankruptcy ballots, and trust claim forms meanings that these instruments will not bear; and reinterpreting Garlock's settlement history on the pretense that Garlock had no

liability, but merely settled to avoid greater defense costs. Garlock then invites the Court to "estimate" the mesothelioma claims on bases that bear no relation to any defendant's available options—the impossible premises that each claim would be tried against all potentially responsible entities at once; that the tens of thousands trials involved in such a program would entail no defense costs; that no party would settle; that Garlock could be confident of winning almost all cases outright; that any distinction between tort law causation standards for determining contested liabilities, on the one hand, and trust standards for recognizing compensable claims, on the other hand, would be erased; and that liability apportionment rules would change so as to relieve Garlock of its burden of proof and protect it from bearing more than a miniscule fraction of the damages awarded to plaintiffs prevailing against it. These fanciful assumptions are brought to bear in Bates White's novel estimation theory, at once overly elaborate in its nineteen notional steps, utterly simplistic in its actual calculations, and deliberately obscure in the extent to which the expert avoids clear explication of his work and points instead to the black box of his "Garlock Analytical Database." That Bates White's approach is indeed designed to minimize the estimate is, as the *Bondex* court recognized, starkly clear from Dr. Bates' ultimate opinion, which holds that the indemnity Garlock will owe to mesothelioma victims over the next fifty years is less than what it paid claimants of that kind in any two years between 2006 and its June 2010 bankruptcy filing.

The world Garlock conjures up for the estimation bears no resemblance to the one in which asbestos defendants, bankrupt or still solvent, have confronted the legal and financial consequences of their asbestos legacies, or to the environment in which Garlock would continue face mesothelioma claims long into the future had it not fled into the bankruptcy haven. That haven is meant to give a debtor an opportunity to come to terms with unmanageable claims in an

orderly fashion, not to wish away the realities of its situation. As precedent requires, measuring the aggregate value of mesothelioma claims based on what the claimants could reasonably expect to receive in the tort system if Garlock had sufficient resources is a fruitful step toward a confirmable plan of reorganization, the proper goal of this estimation proceeding. That purpose requires rejection of the estimate that Garlock has presented.

For the reasons set forth in this brief, the Court should adopt Dr. Peterson's approach and estimate the pending and future mesothelioma claims against Garlock, in the aggregate, at $1.265 billion in net present value.

Respectfully submitted,

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